Supreme Court, U.S.
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No. 92-664

In The

Supreme Court of the United States

October Term, 1992

RONALD H. RILEY,

Petitioner,

v.

KINGSLEY UNDERWRITING AGENCIES, LTD., a British corporation, LIME STREET UNDERWRITING AGENCIES, LTD., a British corporation, BANKSIDE SYNDICATE LIMITED, a British corporation, FIRSTBANK OF VAIL, N.A., ROBIN C. KINGSLEY, ROBERT HALLAM, SOCIETY AND COUNCIL OF LLOYD'S, and JOHN DOES I through X,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a foreign issuer of securities may circumvent compliance with the U.S. Securities laws through use of choice-of-law and choice-of-forum clauses that operate in tandem as a prospective waiver of the Securities laws' substantive protections.

2. Whether a foreign issuer of securities may circumvent compliance with the U.S. Securities laws through use of an arbitration clause subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards that operates as a prospective waiver of the Securities laws' substantive protections.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Ronald H. Riley (hereinafter "Mr. Riley") respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on July 17, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit (hereinafter "Tenth Circuit") is reported at 969 F.2d 953 (10th Cir. 1992) and is reprinted in appendix A hereto, at 1-A, *infra*.

The Order of the United States District Court for the District of Colorado (Carrigan, J.R.) has not been reported. It is reprinted in appendix B hereto, at 1-B, *infra*.

JURISDICTION

Invoking federal jurisdiction under 15 U.S.C. § 77v and 15 U.S.C. § 78aa, Mr. Riley brought suit in the United States District Court for the District of Colorado. On August 30, 1991, Mr. Riley's Complaint was dismissed, *sua sponte*, for lack of subject matter jurisdiction based on an arbitration clause, choice-of-law clause, and choice-of-forum clause contained within agreements between Mr. Riley and certain of the Respondents.

Mr. Riley appealed this dismissal to the Tenth Circuit invoking jurisdiction pursuant to 28 U.S.C. § 1291. On July 17, 1992, the Tenth Circuit entered a judgment affirming the District Court's order.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. *28 U.S.C. § 1291. Final Decisions of District Courts.*

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

2. *28 U.S.C. § 1254(1). Courts of appeals; certiorari; certified questions.*

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

3. *15 U.S.C. § 77n (Securities Act of 1933, § 14). Contrary Stipulations Void.*

Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void.

4. *15 U.S.C. § 78cc(a) (Securities Exchange Act of 1934, § 29(a)). Contrary Stipulations Void.*

Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

5. *Lloyd's Act of 1982.*

14. (1) This Section shall only exempt the Society [of Lloyd's] from liability in damages at the suit of a member of the Lloyd's community.

(2) For the purposes of this section a member of the Lloyd's community shall be –

(a) a person who is –
(i) a member of the Society;
(ii) a Lloyd's broker;
(iii) an underwriting agent;
(iv) an annual subscriber;
(v) an associate;
(vi) a director or partner of a Lloyd's broker or an underwriting agent;
(vii) a person who works for a Lloyd's broker or underwriting agent as a manager; or

(b) a person who has been a member of the Lloyd's community in one or more of the capacities listed in paragraph (a) above; or

(c) a person who is seeking or has sought to become a member of the Lloyd's community in one or more of the capacities listed in paragraph (a) above.

(3) Subject to subsections (1), (4) and (5) of this section, the Society shall not be liable for damages

whether for negligence or other tort, breach of duty or otherwise, in respect of any exercise of or omission to exercise any power, duty or function conferred or imposed by Lloyd's Acts 1871 to 1982 or any bylaw or regulation made thereunder –

(a) in so far as the underwriting business of any member of the Society or the costs of his membership or the business of any person as a Lloyd's broker or underwriting agent may be affected; or

(b) in so far as relates to the admission or non-admission to, or the continuance of, or the suspension or exclusion from, membership of the Society; or

(c) in so far as relates to the grant, continuance, suspension, withdrawal or refusal of permission to carry on business at Lloyd's as a Lloyd's broker or an underwriting agent or in any capacity connected therewith; or

(d) in so far as relates to the exercise of, or omission to exercise, disciplinary functions, powers and duties; or

(e) in so far as relates to the exercise of, or omission to exercise, any powers, functions or duties under bylaws made pursuant to paragraphs (21), (22), (23), (24) and (25) of Schedule 2 to this Act;

unless the act or omission complained of –

(i) was done or omitted to be done in bad faith; or

(ii) was that of an employee of the Society and occurred in the course of the employee carrying out routine or clerical duties, that is to say

duties which do not involve the exercise of any discretion.

(4) Nothing in this section shall affect any liability of the Society in respect to the death of or personal injury to any person, and for the purposes of this Section the expression "personal injury" means bodily injury, any disease and any impairment of a person's physical or mental condition.

(5) Nothing in this section shall exempt the Society from liability for libel or slander.

(6) For the purposes of this section "the Society" means the Society itself and also any of its officers and employees and any person or persons in or to whom (whether individually or collectively) any powers or functions are vested or delegated by or pursuant to Lloyd's Acts 1871 to 1982.

6. *The Financial Services Act of 1986.*

42 Lloyd's

The Society of Lloyd's and persons permitted by the Council of Lloyd's to act as underwriting agents at Lloyd's are exempted persons as respects investment business carried on in connection with or for the purpose of insurance business at Lloyd's.

7. *9 U.S.C. § 201, et. seq. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article II(3).*

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties

to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

STATEMENT OF THE CASE

Mr. Riley brought suit against the Society and Council of Lloyd's (hereinafter "Lloyd's") and several of its agents seeking a declaratory judgment that the sale to Mr. Riley of securities issued by Lloyd's and its agents for the years 1988, 1989, and 1990 constitutes the sale of unregistered securities and violates the registration requirements of section 12 of the Securities Act of 1933 (hereinafter the "1933 Act"). Mr. Riley also brought claims pursuant to the anti-fraud provisions of the Securities Exchange Act of 1934 (hereinafter the "1934 Act") (collectively referred to as the "U.S. Securities laws"), as well as various common law claims.

A. *The Lloyd's Investment Scheme.*

Under Lloyd's investment scheme, investors such as Mr. Riley (called "Names"), invest money in Lloyd's and place all of their assets at risk with the expectation that Lloyd's or Lloyd's agents will effectively underwrite insurance risks and generate a profit for the Names. The assets of the Names create insurance reserves that allow various Lloyd's syndicates to underwrite insurance contracts.

All decisions concerning the type of insurance risks to be underwritten are made for the Name by agents of

Lloyd's, known as Members' agents. An accounting is typically performed three years after the investment is made and the syndicate invested in is then closed. Profits or losses incurred by the syndicate are then allocated among Names who participated in the syndicate on a pro rata basis based upon the amount of their investment in the syndicate. Names are personally liable for their pro rata share of any losses incurred.

Approximately 2900 U.S. citizens are Names. These citizens provide over a billion dollars in capital annually to Lloyd's. These investments are made as a result of Lloyd's mass distribution of securities in the United States, and constitute a sale of securities by Lloyd's and its agents.

B. *Mr. Riley's Investment In Lloyd's.*

Mr. Riley became a Name in 1980 and continued to reinvest in Lloyd's each year through 1990. From 1980 through 1990, Mr. Riley's investment increased incrementally from £150,000 to in excess of £1 million. Mr. Riley increased his investment in reliance upon representations by Lloyd's and its agents as to the safe and conservative nature of the investment, as well as the strength and integrity of the Lloyd's community. At the time of each annual investment decision for the years at issue, 1988 through 1990, Mr. Riley was a resident of Colorado, and made his investment decisions based upon oral and written communications by Lloyd's and its agents that he received through the U.S. mail in Colorado.

In connection with his investments in Lloyd's, Mr. Riley entered into various agreements with Lloyd's and

the Lloyd's agents. One such document, which Mr. Riley executed in Colorado, was a "general undertaking" dated January 1, 1987. Paragraphs 2.1 and 2.2 of the General Undertaking provide as follows:

> 2.1 The rights and obligations of the parties arising out of or relating to [Riley's] membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this undertaking shall be governed by and construed in accordance with the laws of England.
>
> 2.2 Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to [Riley's] membership of, and/or underwriting of insurance business at, Lloyd's. . . .

On or about September 29, 1989, Mr. Riley, while in Colorado, entered into another agreement (the "Members Agent Agreement") with Lime Street. The relevant provisions of the Members Agent Agreement are as follows:

> 15.1 [A]ny dispute, difference, question or claim relating to this agreement which may arise between the agent [Lime Street Underwriting Agencies, Ltd.] and the name [Riley] shall be referred at the request of either party to arbitration in London by a sole arbitrator to be appointed, in default of agreement between the parties, by the chairman or deputy chairman of Lloyd's for the time being.

18.1 This agreement is governed by, and shall be construed in accordance with, the laws of England.

18.2 Each of the parties hereby revocably submits for all purposes of and in connection with this agreement to the exclusive jurisdiction of the courts of England.

Both the United States District Court for the District of Colorado and the Tenth Circuit held that the choice-of-law and choice-of-forum provisions (collectively the "Choice Clauses") as well as the arbitration provisions (the "Arbitration Clause") contained in the above referenced contracts must be enforced. The result of such enforcement is that Mr. Riley is deprived of the substantive protections afforded him under the U.S. Securities laws.

REASONS FOR GRANTING THE WRIT

I.

THE TENTH CIRCUIT'S ENFORCEMENT OF THE CHOICE CLAUSES VIOLATES THE CONGRESSIONAL MANDATE AND THE AUTHORITIES OF THIS COURT HOLDING THAT THE SUBSTANTIVE PROVISIONS OF THE SECURITIES LAWS MAY NOT BE WAIVED.

A. Choice Clauses may not be Enforced if they Operate to Deprive a U.S. Citizen of Substantive Statutory Rights under the U.S. Securities Laws Pursuant to *Mitsubishi v. Soler Chrysler-Plymouth, Inc.* and Other Authorities of this Court and the Anti-Waiver Provisions of the U.S. Securities Laws.

This case presents the Supreme Court with a matter of preeminent public importance regarding the preservation

of U.S. citizens' substantive protections under the U.S. Securities laws. Specifically, this Court is called upon to decide whether a foreign issuer of securities may circumvent compliance with the U.S. Securities laws through the simple expedient of using choice-of-law and forum clauses which operate prospectively to waive substantive statutory protections provided to citizens by the U.S. Securities laws. The Tenth Circuit's decision, that refused to strike down such Choice Clauses, allows for exactly this result.

The Tenth Circuit's opinion held that U.S. Securities laws' statutory protections are, in essence, pre-empted by the public policy favoring enforcement of Choice Clauses in international agreements. The Tenth Circuit's decision disregards and conflicts with decisions of this Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637, n. 19 (1985) and other cases, as well as the Congressional mandate that the substantive provisions of the U.S. Securities laws may not be waived.

In *Mitsubishi*, this Court upheld a choice-of-forum clause that provided for arbitration of all disputes in Japan only after expressly finding that "by agreeing to arbitrate under the U.S. antitrust laws, a party does *not forgo* the *substantive rights afforded by the statute* . . . . " 473 U.S. at 628 (emphasis added). However, as concerns the validity of a clause that would require foreign arbitration and which would also circumvent statutory protections, this Court concluded:

> . . . [i]n the event the choice-of-forum and choice-of-law clauses operate in tandem as a *prospective waiver* of a *party's right* to pursue *statutory remedies* for antitrust violations, we

> would have little hesitation in *condemning the agreement as against public policy.*

473 U.S. at 637, n. 19 (citations omitted) (emphasis added).

This Court's holding in *Mitsubishi*, premised upon the strong interest in ensuring that U.S. antitrust laws are enforced, is even more compelling when applied to the U.S. Securities laws, where Congress has explicitly mandated that any agreements *"to waive compliance with any provision of [either Act are] void." See* Section 14 of the 1933 Act (15 U.S.C. § 77n) and Section 29(a) of the 1934 Act (15 U.S.C. § 78cc(a)) (collectively "anti-waiver provisions") (emphasis added). These anti-waiver provisions ensure that the primary purpose of the U.S. Securities laws, to protect investors through the requirement of full, complete, and accurate disclosure by issuers of securities, is fulfilled. *See Ernst and Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976).

This Court has interpreted these provisions, consistent with the holding in *Mitsubishi*, to mean that, although an investor may waive the *procedural* benefits of the 1933 or 1934 Acts, the *substantive* protections of either Act may not be waived:

> The concern that § 29(a) is directed against is evident from the statute's plain language: is a concern with whether an agreement "waive[s] compliance with [a] provision" of the Exchange Act. The voluntariness of the agreement is irrelevant to this inquire: if a stipulation waives compliance with a statutory duty, it is void under § 29(a), whether voluntary or not.

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 230 (1987); *see also Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481-482 (1989).

B. The Choice Clauses at Issue Herein Operate to Waive Mr. Riley's Substantive Statutory Rights Under the U.S. Securities Laws.

Since the Choice Clauses operate to deprive Mr. Riley of his substantive statutory rights under the U.S. Securities laws, the clauses cannot be enforced pursuant to *Mitsubishi, McMahon, Rodriguez*, and the anti-waiver provisions of the U.S. Securities laws. These clauses seek to impose English jurisdiction and English law upon Mr. Riley wherein Lloyd's and the Lloyd's Agents are not subject to the U.S. Securities laws.[1] Under English law, Lloyd's is exempt from liability for almost all civil securities claims pursuant to the Financial Services Act, including claims relating to registration and disclosure. Financial Services Act § 42.[2] Moreover, Lloyd's is exempt from liability for virtually all common law claims brought by a Name under the Lloyd's Act unless it was "done or omitted to be done in bad faith." Lloyd's Act, § 14. These

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[1] Under conflict of law principles, an English court will give effect to the choice of law clauses unless these clauses are contrary to English public policy. Dicey and Morris, Conflict of Laws, at 1168-69 (11th Ed. 1987). Clearly, since English law is the specified law, there would be no violation of public policy and the clauses would be enforced.

[2] The only pertinent sections of the Financial Services Act which do apply to Lloyd's and the Lloyd's Agents relate to criminal penalties for known misrepresentations of fact, and civil penalties for which there are no private rights of action.

exemptions translate to deprive Mr. Riley of his substantive rights under the U.S. Securities laws as follows. First, section 12(1) of the Securities Act provides for *strict liability* for failure to register securities. In contrast, under English law, the FSA exempts Lloyd's from registration. Second, section 12(2) of the Securities Act provides for *strict liability* against the offeror or seller of a security by means of a prospectus containing material misrepresentations or omissions. In contrast, under the Lloyd's Act of 1982, Lloyd's is exempt from all claims except those for "bad faith," which requires knowledge on the part of the seller. Under the FSA, there is no private right of action for misrepresentation.

Thus, while *English law protects Lloyd's* by completely exempting Lloyd's from registration requirements and from liability, except for bad faith; the *U.S. Securities laws protect investors* by imposing strict liability on issuers of securities who violate very stringent registration and disclosure laws.

The Tenth Circuit chose not to address the fact that Mr. Riley would lose his substantive rights under the U.S. Securities laws, instead concluding that, although English laws might be less favorable to Mr. Riley, he would not lose his day in court because he could still pursue a claim for fraud. *Riley*, 969 F.2d at 958.[3] This holding ignores the

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[3] Although Mr. Riley expressly alleged that he purchased a "security" from Lloyd's, the Tenth Circuit incorrectly concluded that it did not have to decide if Riley's investment into Lloyd's constituted a security. However, the Tenth Circuit was required to construe the allegation as true for purposes of the Motion to Dismiss. *U.S. v. Diebold*, 369 U.S. 654, 655 (1952). Moreover, the

mandates of the U.S. Securities laws as well as *Rodriguez* and *McMahon* that substantive statutory protections may not be waived. Clearly, such statutory protections include claims for violations of the registration, disclosure, and anti-fraud provisions of the U.S. Securities laws of which Mr. Riley will be deprived under English law.[4]

C. The Authority Relied upon by the Tenth Circuit is Inapposite to the Case at Hand; thus, the Tenth Circuit's Decision was in Error.

The Tenth Circuit rejected Mr. Riley's argument that Mitsubishi requires that Choice Clauses not be enforced if they operate to deprive a U.S. citizen of substantive statutory rights, concluding instead, that in an "international agreement," the Choice Clauses must be given effect. *Riley*, 969 F.2d at 957. The Tenth Circuit relied on *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Carnival Cruise Lines, Inc. v. Shute*, ___ U.S. ___, 111 S.Ct. 1522 (1991); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) and *Mitsubishi* as authority for this conclusion.

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only Court to address this issue has specifically determined that an investment in Lloyd's is a security as defined by the U.S. Securities laws. *See* Memorandum & Recommendation Regarding Lloyd's of London's Motion to Dismiss, *Leslie v. Lloyd's of London, et. al.*, Civ. Action No. H-90-1907, at C-13 through C-14, attached hereto as Exhibit C.

[4] As this Court has expressly pointed out, even a claim under Rule 10b-5 is a unique remedy which is not co-extensive with common law fraud. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 388-89 (1983).

First, the Tenth Circuit was incorrect in holding that this agreement is truly international in character, since this case involves a mass distribution of securities in the United States to U.S. citizens by a foreign issuer. Hardly an "international businessman," Mr. Riley is a restaurant owner and local entrepreneur in Colorado.[5]

Second, the Tenth Circuit erroneously concluded that *Mitsubishi* must be read more restrictively in light of the other authorities relied upon by the Court. *Riley*, 969 F.2d at 957. *Mitsubishi*, as the most recent of the authorities relied upon, is the controlling precedent with respect to enforcement of Choice Clauses, and clearly dictates that such clauses not be enforced when a U.S. citizen's statutory rights will be violated.[6]

Third, the other cases relied upon by the Tenth Circuit do not support the Tenth Circuit's conclusion and are inapposite to a mass distribution of securities in the U.S. The Choice Clauses at issue in *M/S Bremen* and *Carnival*

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[5] Further, during the entire time period which is the subject of this action (investments made between 1988 and 1990), Riley made *every* investment decision in Colorado, based upon representations and literature sent to him through the U.S. mail and meetings he had with Lloyd's representatives in the United States. This situation can hardly be characterized as an international agreement.

[6] The Tenth Circuit simply disregarded Mr. Riley's reliance on *Mitsubishi*, stating his argument was based only on an "isolated sentence in a footnote." *Riley*, 969 F.2d at 957. Clearly, however, this footnote, when read in conjunction with the rest of the *Mitsubishi* decision, establishes an important exception to enforcement of choice clauses, especially in light of this Court's later decisions in *Rodriguez* and *McMahon* and the anti-waiver provisions of the U.S. Securities laws.

Cruise Lines did not operate as a deprivation of statutory rights, since no statutory rights were even implicated. Moreover, this Court in *M/S Bremen* specifically recognized that Choice Clauses should not be enforced when enforcement would contravene strong public policy. 407 U.S. at 15. Clearly, public policy is violated by enforcement of Choice Clauses that waive substantive protections provided by the U.S. Securities laws. This is especially true in light of the Congressional mandate that such protections can not be waived.

Finally, the arbitration provision in *Scherk* specifically provided that Illinois law applied; thus, the potential waiver of protections under the U.S. Securities laws or their equivalent was not at issue. This Court recognized this distinction in *McMahon*, stating that "*Scherk* supports our understanding that *Wilko* must be read as barring waiver of a judicial forum only where arbitration is inadequate to protect the substantive rights at issue." 482 U.S. at 229, *citing Wilko v. Swan*, 346 U.S. 427 (1953). Moreover, *Scherk* can be distinguished factually from the case at hand. *Scherk* involved two transnational corporations that contracted to purchase and sell several businesses' all of which were located outside the U.S. No mass distribution of securities to an individual investor in the U.S. was at issue as in the case at hand.

Based upon the foregoing, the Tenth Circuit's decision was in error, as it disregards this Court's holdings in *Mitsubishi*, *McMahon*, and *Rodriguez*, as well as the Congressional mandate of the U.S. Securities laws, that substantive rights thereunder may not be waived.

II.

THE TENTH CIRCUIT ERRED IN ITS INTERPRETATION OF THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN NOT RECOGNIZING THE EXCEPTIONS TO ENFORCEMENT OF AGREEMENTS TO ARBITRATE.

A. Enforcement of an Arbitration Clause can be Denied based upon Fundamental Public Policy of the Forum State.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201, et. seq. (the "Convention"), requires enforcement of an arbitration agreement unless the agreement is null and void, inoperative or incapable of being performed. An agreement is 'null and void' (1) when it is subject to an internationally recognized defense such as duress, mistake, fraud, or waiver. . . . or (2) *when it contravenes fundamental policies of the forum state." Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 530, n. 10 (1974); *Rhone Mediterranee Compagnia v. Lauro*, 712 F.2d 50, 53 (3d Cir. 1983); *Meadows Indemnity Co. v. Baccala & Shoop Insurance Services Inc.*, 760 F. Supp. 1036, 1043 (E.D.N.Y. 1991) (emphasis added).

B. Fundamental Public Policy is Violated When Enforcement of an Arbitration Clause Waives the Substantive Protections of the U.S. Securities Laws.

It is undisputed that the U.S. Securities laws are designed to advance important public policies. *See Gilmer v. Interstate/Johnson Lane Corp.*, ___ U.S. ___, 111 S.Ct.

1647, 1653 (1991).[7] The importance of the U.S. Securities laws is evidenced in the anti-waiver provisions present in both the 1933 Act and the 1934 Act. *See* § I.A., *supra*. This Court, construing the anti-waiver provisions, has concluded that arbitration of U.S. Securities claims will only be allowed where the substantive rights and duties imposed by law are not waived. *Id*.

The Tenth Circuit's decision was premised on its conclusion that it need not decide whether Mr. Riley's participation as a Name constitutes a security. This conclusion was erroneous. *See* § I.B., *supra*, n. 3. Moreover, applying the U.S. Securities laws is essential to the decision of this Court since the fundamental U.S. public policy behind the U.S. Securities laws will be thwarted by the enforcement of the Arbitration Clause. As support for its decision that the Arbitration Clause must be enforced, the Tenth Circuit relied on *Scherk v. Alberto-Culver Co.*, *supra*, stating it compels arbitration in a foreign tribunal, even when protections under the U.S. Securities laws are eliminated. *Riley*, 969 F.2d at 959. However, *Scherk* is not applicable to the case at hand, since no party was being deprived of statutory protections therein. *See* § I.C., *supra*.

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[7] This Court, in *Gilmer*, noted that arbitration under the securities laws is appropriate, "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Gilmer*, 111 S.Ct. at 1652, *citing Mitsubishi*, 473 U.S. at 637. If the Arbitration Clause at bar is enforced, *none* of these stipulations will be served. *See* § I, *supra*.

C. The Arbitration Clause at Issue Herein will not protect Mr. Riley's Substantive Rights under the U.S. Securities laws and should, therefore, not be Enforced.

Enforcement of the Arbitration Clause in this case will circumvent applicability of the U.S. Securities laws and waive its substantive protections, a blatant violation of not only fundamental U.S. public policy but also the Congressional mandate that the protections may not be waived. The Arbitration Clause, like the Choice Clauses, provides that English law will apply. Thus, if the Arbitration Clause is enforced, Mr. Riley would be unable to claim any violations of the U.S. Securities laws. *See* § I.B., *supra*. Accordingly, the Arbitration Clause is null and void and should not be enforced.

III.

THE TENTH CIRCUIT'S DECISION TO ENFORCE THE CHOICE CLAUSES AND THE ARBITRATION CLAUSE CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL COURTS ON THIS VERY SAME ISSUE.

Three federal courts have reached conflicting conclusions in cases filed by other Names that are almost identical to Mr. Riley's. These cases are (1) *Leslie v. Lloyd's of London*, Civ. Action No. H-90-1907 (S.D. Tex. 1991); (2) *Roby v. The Corporation of Lloyd's*, 91 Civ. 7081 (S.D.N.Y. August 18, 1992) (LEXIS, Genfed library, Dist. file), now on appeal to the United States Court of Appeals for the Second Circuit; and (3) *Bonny v. the Society of Lloyd's*, 91 C 5525 (N.D. Ill. Feb. 24, 1992) (LEXIS, Genfed library, Dist.

file), now on appeal to the United States Court of Appeals for the Seventh Circuit.

In each of these cases, the Names brought claims against Lloyd's for violations of the U.S. Securities laws and in each of these cases, Lloyd's filed a motion to dismiss based upon the Choice Clauses and the Arbitration Clause. Since there are 2900 Names in the United States, there is clearly the potential for further suits.

In *Leslie*, the federal district court affirmed a recommendation of the magistrate judge that Lloyd's motion to dismiss be denied thereby refusing to enforce the Choice Clauses and the Arbitration Clause. The magistrate judge concluded in her recommendation that "[i]t would be unreasonable to allow such defendants to avoid local laws requiring accurate and complete representation of their product, as all others who sell investments locally are required to do, by simply including forum-selection clauses in form contracts." *See* Memorandum & Recommendation Regarding Lloyd's of London's Motion to Dismiss and Opinion, at C-6, attached hereto as Appendix C; *See also* Memorandum & Order affirming the Recommendation, attached hereto as Appendix D.

In *Roby* and *Bonny*, the federal district courts decided adversely to *Leslie*, by enforcing the Choice Clauses and the Arbitration Clause and granting motions to dismiss on this issue. The courts therein concluded that the U.S. Securities laws do not stand in the way of enforcement of the contracts. The federal district court in *Bonny* specifically rejected the magistrate judge's recommendation that the Choice Clauses not be enforced. *See* Magistrate's Opinion at 784 F. Supp. 1350 (N.D. Ill. 1991). Both *Roby*

and *Bonny* are on appeal in their respective circuits, and it is likely that the decisions of these circuits will be ripe for review by this Court later this year.

CONCLUSION

As shown by the foregoing, this Petition involves important questions of federal law which have not been, but should be, settled by this Court. If the District Court decision, as affirmed by the Tenth Circuit, is allowed to stand, it clearly will violate the fundamental policy underlying the U.S. Securities laws to protect investors through the requirement of full, complete, and accurate disclosure by issuers of securities. As the District Court in *Leslie* recognized in adopting the Magistrate judge's opinion, this case is not about international commerce, but instead, is about a mass distribution of securities in the United States by a foreign company to United States citizens. Such conduct is clearly within the auspices of the U.S. Securities laws and its anti-waiver provisions.

The Tenth Circuit's decision sends a clear message to foreign issuers of securities wishing to raise money in the U.S.: By merely including in an agreement clauses that subject disputes to the jurisdiction and laws of a foreign country which does not have protections equivalent to those provided in the U.S. Securities laws, the foreign issuer may avoid compliance with the stringent disclosure and anti-fraud protections in the U.S. Securities laws. Not only does the Tenth Circuit's decision establish a dangerous precedent, it is also contrary to strong, clearly articulated, public policies.

For the reasons set forth herein, this Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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October 14, 1992

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

RONALD H. RILEY, Individually, Plaintiff-Appellant, vs. KINGSLEY UNDERWRITING AGENCIES, LTD., a British corporation, LIME STREET UNDERWRITING AGENCIES, LTD., a British corporation, BANKSIDE SYNDICATE LIMITED, a British corporation, FIRSTBANK OF VAIL, N.A., ROBIN C. KINGSLEY, ROBERT HALLAM, SOCIETY and COUNCIL OF LLOYD'S and JOHN DOES I through X, Defendants-Appellees.	)	No. 91-1311

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. No. 91-C-1411)

Richard G. Sander (George G. Ventura, with him on the brief), both of Popham, Haik, Schnobrich & Kaufman, Ltd., Denver, Colorado, for Plaintiff-Appellant.

Neil Peck (and Thomas S. Nichols & Linda Wackwitz, all of Davis, Graham & Stubbs, Denver, Colorado, and Taylor R. Briggs, Sheila H. Marshall & Mary L. B. Betts, of LeBoeuf, Lamb, Leiby & MacRae, New York, New York, with him on the brief) for Defendants-Appellees.

Before McKAY, Chief Judge, LOGAN and KELLY, Circuit Judges.

KELLY, Circuit Judge.

Plaintiff-Appellant, Ronald H. Riley (Riley) filed suit in federal district court asserting claims under federal and state securities laws, as well as state tort law. Named defendants were Society and Council of Lloyd's, a British entity (Lloyd's); Kingsley Underwriting Agencies, Ltd. (Kingsley Underwriting), Lime Street Underwriting Agencies, Ltd. (Lime Street Underwriting), and Bankside Syndicate, all British corporations (Underwriting Defendants); Robin C. Kingsley (Kingsley) and Robert Hallam (Hallam), both British citizens, and FirstBank of Vail, N.A. (FirstBank). Defendants, other than FirstBank, purported to enter a special appearance to raise the following questions: (1) whether choice of forum and law

provisions in Riley's contract with Lloyd's were valid and enforceable, and (2) whether arbitration and choice of law provisions in Riley's contract with the Underwriters, requiring arbitration in England and application of English law, were valid and enforceable. The district court held that the arbitration and choice of forum and law provisions in the contracts were valid and enforceable. After concluding it lacked further jurisdiction, the district court dismissed all of Riley's claims, without prejudice.

After filing his appeal, Riley moved for an injunction pending appeal to prohibit Lloyd's from drawing on certain letters of credit. Three days later, we issued an order granting the motion, denying an immediate hearing and accelerating oral argument. For the reasons discussed below, the district court's judgment dismissing Riley's claims is affirmed and our injunction pending appeal is dissolved.

Background

In order to understand the operative facts, a brief description of the parties is necessary. All parties, save Riley and FirstBank, are British citizens or entities. Kingsley Underwriting is a predecessor in interest to Lime Street Underwriting. Both are registered underwriting agencies with Lloyd's. Bankside Syndicate, Ltd. is a registered managing agent with Lloyd's and conducts the day-to-day business of Lime Street. Kingsley was the chairman of Lime Street at one time and formerly the chairman of the Kingsley Underwriting. Hallam is the current Director of Lime Street and past Director of Kingsley

Underwriting. Lloyd's is a British corporation with its principal place of business in London. Lloyd's was incorporated in 1891, but it has functioned as a market for writing insurance policies for some 300 years.

Riley was interested in becoming a member of Lloyd's and travelled to England on several occasions to pursue this quest. While there, Riley visited with various persons, including Hallam and Kingsley. In January 1980, Riley entered into a General Undertaking with Lloyd's and a Members' Agent's Agreement with the Underwriters. Both of these agreements provided that the courts of England would have exclusive jurisdiction over any dispute and that the laws of England would apply.[1, 2] Additionally,

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[1] The General Undertaking agreement provided:

2.1 The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking shall be governed by and construed in accordance with the laws of England.

2.2 Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and that accordingly any suit, action or proceeding (together in this Clause 2 referred to as "Proceedings") arising out of or relating to such matters shall be brought in such courts and, to this end, each party hereto irrevocably agrees to submit to the jurisdiction of the courts of England and irrevocably waives any objection which it may have now or hereafter to (a) any Proceedings being brought in any such court as is referred to in this Clause 2 and

the Members' Agent's Agreement provided for arbitration in the event of any dispute.[3]

(b) any claim that any such proceedings have been brought in an inconvenient forum and further irrevocably agrees that a judgment in any Proceedings brought in the English courts shall be conclusive and binding upon each party and may be enforced in the courts of any other jurisdiction.

2.3 The choice of law and jurisdiction referred to in this Clause 2 shall continue in full force and effect in respect of any dispute and/or controversy of whatsoever nature arising out of or relating to any of the matters referred to in this Undertaking notwithstanding that the Member ceases, for any reason, to be a member of, or to underwrite insurance business at, Lloyd's.

[2] The Members' Agent's Agreement provided:

18. Governing Law and Jurisdiction.

18.1 This agreement is governed by, and shall be construed in accordance with the laws of England.

18.2 Each of the parties hereby irrevocably submits for all purposes of and in connection with this Agreement to the exclusive jurisdiction of the courts of England.

[3] The Members' Agent's Agreement provided:

15. Arbitration.

15.1 Subject to Clause 15.3, any dispute, difference, question or claim relating to this Agreement which may arise between the Agent and the Name shall be referred at the request of either party to arbitration in London by a sole arbitrator to be appointed, in default of agreement between the parties, by the Chairman or a Deputy Chairman of Lloyd's for the time being.

Riley's underwriting began in January 1980 with a premium income limit of 150,000 pounds. He remained a member of Lloyd's through 1990, and each year increased the amount of premium income underwritten. By 1989, Riley was underwriting premium income in excess of a million pounds.

In connection with his underwriting, Riley was required to meet Lloyd's deposit requirements. Riley obtained letters of credit from FirstBank. FirstBank in turn issued letters of credit to First National Bank of Boston (Guernsey) Ltd. as security for a letter of credit to be issued by the London branch of the Guernsey Bank in favor of Lloyd's. Lloyd's holds these letters of credit as trustee of a trust for the benefit of Riley's insured policy holders. In the event a member fails or refuses to cover his pro rata share of underwriting liability, then Lloyd's may draw on the letter of credit to cover the obligation. In the event the letter of credit is insufficient, Lloyd's will look to a member's assets to satisfy any remaining underwriting liability.

The syndicates in which Riley participated have experienced large losses, resulting in calls in excess of 300,000 pounds. Riley has been notified that, if he does not satisfy the calls, Lloyd's will draw against the letter of credit issued by Guernsey Bank. Guernsey Bank would then draw on the FirstBank letters of credit.

Proceeding apparently on the theory that the best defense is a good offense, Riley filed this action seeking declaratory judgment, rescission and damages against Defendants other than FirstBank. Riley claimed that these Defendants engaged in the offer and sale of unregistered

securities and made untrue statements of material fact and material omissions in connection with the sale of securities, violating the Securities Act of 1933 (1933 Act), §§ 12(1) & 12(2), 15 U.S.C. §§ 771(1) & 771(2), the Securities Exchange Act of 1934 (1934 Act), § 10, 15 U.S.C. § 78j(b) and Rule 10b-5, 17 C.F.R. 240.10b-5. Additionally, Riley made similar allegations under state securities law, see Colo. Rev. Stat. §§ 11-51-107 & 11-51-125 (1987), and alleged common law fraud. Riley sought a writ of attachment against Lloyd's and an injunction to prevent Defendants from drawing on the letters of credit.

Riley obtained a temporary restraining order from the district court ex parte. Prior to a preliminary injunction hearing, Riley, Lloyd's, the Underwriting Defendants, Kingsley and Hallam entered into a court-approved stipulation that the hearing would be limited to the threshold issues of the applicability and effect of the forum selection clause and the arbitration clause discussed above. Defendants specifically reserved their lack of in personam jurisdiction defense.

Discussion

A motion to dismiss based on a forum selection clause frequently is analyzed as a motion to dismiss for improper venue under Fed. R. Civ. P. 12(b)(3). *Spradlin v. Lear Siegler Mgmt. Servs.*, 926 F.2d 865, 866 (9th Cir. 1991); *Commerce Consultants Int'l., Inc. v. Vetrerie Riunite, S.p.A.*, 867 F.2d 697, 698 (D.C. Cir. 1989); *Medoil Corp. v. Citicorp*, 729 F. Supp. 1456, 1457 n.l) (S.D.N.Y. 1990). *But see David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 253 n.2 (2d Cir.) (arbitration provision; motion to dismiss

for lack of subject matter jurisdiction), *cert. dismissed,* 112 S. Ct. 17 (1991). The enforceability of forum selection, choice of law and arbitration provisions are questions of law which we review de novo. *See Milk 'N' More v. Beavert,* ___ F.2d ___, 1992 WL 93074, *3 (10th Cir. May 8, 1992). We hold that the parties must abide by their agreement and resolve their disputes in England, either before an English court or arbitrator, as the case may be. Three reasons persuade us: (1) the parties' undertaking is truly international in character, (2) all parties other than Riley and FirstBank are British, and (3) virtually all activities giving rise to the suggested claims occurred in England.

A. Forum Selection and Choice of Law Provisions.

Riley concedes, as he must, that "the enforcement of choice of forum and choice of law clauses is consistent with recent U.S. Supreme Court decisions." However, he relies on an isolated sentence in a footnote in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 637 n.19 (1985), which stated that forum selection and choice of law provisions which operate as prospective waivers of statutory antitrust claims would not be enforced as against public policy. Riley suggests that he is being deprived of all substantive rights under the federal securities laws and therefore should be relieved of his agreements on public policy grounds.[4] On these facts, we do not read *Mitsubishi* as restrictively as Riley when

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[4] We need not decide whether Riley's participation as a Name constitutes a security, or whether Lloyd's or the Defendant Underwriters are subject to the provisions of the 1933 or 1934 securities acts.

Mitsubishi is viewed against the backdrop of Supreme Court decisions in the area.

When an agreement is truly international, as here, and reflects numerous contacts with the foreign forum, the Supreme Court has quite clearly held that the parties' choice of law and forum selection provisions will be given effect. *See Carnival Cruise Lines Inc. v. Shute*, ___ U.S. ___, ___, 111 S. Ct. 1522, 1527-28 (1991); *Mitsubishi*, 473 U.S. at 631; *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519-20 (1974); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972). We review these authorities briefly.

In *M/S Bremen*, the Court identified an important rationale for the rule that such provisions should be enforced.

> The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets in international waters exclusively on our terms, governed by our laws and resolved in our courts.

Id., 407 U.S. at 9. The Court concluded:

> Thus, in light of present day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside.

Id. at 15. Forum selection provisions are "prima facie valid" and a party resisting enforcement carries a heavy burden of showing that the provision itself is invalid due to fraud or overreaching or that enforcement would be

unreasonable and unjust under the circumstances. *See Id.* at 10, 15; *Seward v. Devine*, 888 F.2d 957, 962 (2d Cir. 1989).

The Court adhered to this position in *Scherk*, which dealt with the applicability of an arbitration provision requiring that any disputes be referred to arbitration before the International Chamber of Commerce in Paris, France, applying Illinois law. Although an arbitration provision was involved, the Court characterized it as "a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." *Id.* 417 U.S. at 519. The Court characterized the agreement at issue as "a truly international agreement" and discussed why these types of provisions are so important in the context of international transactions.

> A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.

Scherk, 417 U.S. at 515, 519. In passing, the Court noted that designating a particular place for arbitration might, under some circumstances, be viewed as an implicit choice of law selection. *Id.* at 519 n.13.

In *Mitsubishi,* the Court upheld a provision that would result in antitrust claims being subject to arbitration in Japan on the basis

> that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, *even assuming that a contrary result would be forthcoming in a domestic context.*

Mitsubishi, 473 U.S. at 3355 (emphasis supplied).

Finally, in *Carnival Cruise Lines,* the Court relied on *M/S Bremen* in enforcing a domestic forum selection clause, despite inconvenience to the plaintiffs. *Carnival Cruise Lines,* 111 S. Ct. at 1528. Only a showing of inconvenience so serious as to foreclose a remedy, perhaps coupled with a showing of bad faith, overreaching or lack of notice, would be sufficient to defeat a contractual forum selection clause. *Id.*

Riley suggests that enforcement of the choice of forum and law provisions is unreasonable because he effectively will be deprived of his day in court. The basis underlying this contention is his perception that recovery will be more difficult under English law than under American law. Riley will not be deprived of his day in court. He may, though, have to structure his case differently than if proceeding in federal district court. The fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not a valid basis to deny enforcement,

provided that the law of the chosen forum is not inherently unfair. *See Carnival Cruise Lines,* 111 S. Ct. at 1528; *AVC Nederland B.V. v. Atrium Investments Ptrshp.,* 740 F.2d 148, 158-59 (2d Cir. 1984); *Medoil Corp.,* 729 F. Supp. at 1460; *Karlberg European Tanspa, Inc. v. JK-Josef Kratz Vertriebsgesellschaft mbH,* 618 F. Supp. 344, 348 (N.D. Ill. 1985); *Dukane Fabrics Int'l Inc.,* 600 F. Supp. 202, 203-04 (S.D.N.Y. 1985). English law does not preclude Riley from pursuing an action for fraud and we agree with the Defendants that the Lloyd's Act does not grant statutory immunity for such claims. *See* Lloyd's Act, § 14(3), Aplt. App. at 286 & Aple. Add. at 307-08. We have been shown nothing to suggest than an English court would not be fair, and in fact, our courts have long recognized that the courts of England are fair and neutral forums. *See M/S Bremen,* 407 U.S. at 12; *Syndicate 420 at Lloyd's London v. Early American Ins. Co.,* 796 F.2d 821, 829 (5th Cir. 1986); *Bonny v. Society of Lloyd's,* 784 F. Supp. 1350, 1353 (N.D. Ill. 1992). Given the international nature of the insurance underwriting transaction, the parties' forum selection and choice of law provisions contained in the agreements should be given effect.

B. The Arbitration Agreement.

Any discussion regarding the efficacy of an agreement to arbitrate in a foreign country between citizens or entities of different countries must begin with a review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), 9 U.S.C. § 201. The Convention was ratified by the United States for differences arising out of commercial legal relationships

and it became effective on December 29, 1970. The United Kingdom and the United States are Contracting States to the Convention. Of course, the ratification of the Convention makes it part of the supreme law of the land, as enforceable as Congressional enactments. *See* U.S. Const. art. VI, cl. 2. *See also Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co.*, 767 F.2d 1140, 1145 (5th Cir. 1985); *Filanto S.P.A. v. Chilewich Int'l Corp.*, ___ F. Supp. ___, 1992 WL 76865, *2 (S.D.N.Y. 1992) The Convention plainly applies to this commercial transaction.

Article II of the Convention[5] imposes a mandatory duty on the courts of a Contracting State to recognize, and enforce an agreement to arbitrate unless the agreement is "null and void, inoperative or incapable of being performed." 29 U.S.C. § 201, art. II(3). Following the plain

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[5] Article II provides:

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange or letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

language of the Convention, the First Circuit has framed the very limited inquiry a court should perform when presented with a request to refer an international dispute to arbitration.

> (1) Is there an agreement in writing to arbitrate the subject of the dispute?
>
> (2) Does the agreement provide for arbitration in the territory of the signatory of the Convention?
>
> (3) Does the agreement arise out of a legal relationship whether contractual or not, which is considered as commercial?
>
> (4) Is a party to the agreement not an American citizen, or does the commercial relationship have some reasonable relation with one or more foreign states?

Ledee v. Ceramiche Ragno, 684 F.2d 184, 186-87 (1st Cir. 1982) (citations omitted). If these questions are answered in the affirmative, a court is *required* to order arbitration. *Id.* at 187. That is the situation in this case. Only if a court finds that the agreement "null and void, inoperative or incapable of being performed," Convention, art. II(3), may it act to the contrary. *Id.*

Riley argues that the "null and void" exception applies. His argument is that the agreement requiring arbitration should be held void as against public policy because several of his claims are grounded in the 1933 and 1934 securities acts, and the application of English law would result in a waiver of certain provisions of those acts. We disagree. As stated by the Court:

> A parochial refusal of the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantage. . . . [T]he dicey atmosphere of such a legal no-man's land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.

Scherk, 417 U.S. at 516-17 (footnote omitted). *Scherk* is persuasive authority in this case because it involved a claimed waiver of a 1934 Act provision. The Court did not reach whether the Convention would require enforcement of the arbitration provision, *see* 417 U.S. at 520 n.15, but nonetheless in the securities context held:

> that the agreement of the parties in this case to arbitrate any dispute arising out of their international commercial transaction is to be respected and enforced by the federal courts in accord with the explicit provisions of the Arbitration Act.

417 U.S. at 519-20.

Likewise, in *Mitsubishi*, the Court relied on the strong federal policy favoring arbitration:

> "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The Arbitration Act establishes that as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. . . . "

473 U.S. at 626 (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

Given this policy and the policy of signatory nations to the Convention which presumes the enforceability of arbitration agreements, we agree with the Third Circuit and its reasoning to the effect that the "null and void" exception in the Convention is to be narrowly construed. *Rhone Mediterranee Compania v. Lauro*, 712 F.2d 50, 53 (3rd Cir. 1983). *See also Ledee*, 684 F.2d at 187; *Meadows Indemnity Co., Ltd. v. Baccala & Shoop Ins. Services, Inc.*, 760 F. Supp. 1036, 1043 (E.D.N.Y. 1991). *Scherk* also leads to the same conclusion, a conclusion further reinforced by Article V(2)[6] of the Convention, which specifically provides for relief when enforcement is sought of an award in violation of public policy.

Riley also suggests, in argument before the district court and on appeal, that all of the choice provisions were induced by fraud, including the arbitration provision. Riley's argument does not persuade us. First, Riley's complaint alleges that he was induced generally to enter the contracts in question as a result of fraud. Aplt. App.

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[6] Article V(2) of the Convention provides:

> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that county (sic); or
>
> (b) the recognition or enforcement of the award would be contrary to the public policy of that country.

at 18 (complaint ¶¶ 118-122). However, Riley never pleaded that the *specific* choice provisions at issue were obtained by fraud. A plaintiff seeking to avoid a choice provision on a fraud theory must, within the confines of Fed. R. Civ. P. 9(b) and 11, plead fraud going to the specific provision; the teachings of *Scherk*, interpreting *M/S Bremen*, require no less. *See Scherk*, 417 U.S. at 519 n.14 (the fraud exception "means that an arbitration or forum selection clause in a contract is not enforceable if the *inclusion of that clause in the contract* was the product of fraud or coercion"); *M/S Bremen*, 407 U.S. at 15 (*clause* must be invalid due to fraud or overreaching). Second, a claim of fraud in the inducement may be resolved by arbitration. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). Third, at no time did Riley offer any evidence on the stipulated issues tending to show that *the arbitration provision* (or any other choice provision, for that matter) was a product of fraud or coercion. *See Carnival Cruise Lines*, 111 S. Ct. at 1528 ("there is no evidence that petitioner obtained respondents' accession to the forum by fraud or overreaching); *Spradlin*, 926 F.2d at 868 (broad and conclusory allegations of fraud without specific factual allegations or evidentiary support are insufficient to invalidate forum selection clauses); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 280 (9th Cir. 1984) (Party seeking to avoid forum selection clause "submitted no significant probative evidence tending to support a claim of adhesion").

Finally, Riley's suggestion that everyone in England will be biased against him has no basis in the record and we will not assume that Mr. Riley would get anything

other than a full and fair hearing. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, ___ U.S. ___, 109 S. Ct. 1917, 1920 (1989); *Mitsubishi*, 473 U.S. at 634; *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 515 (9th Cir. 1988); *Syndicate 420*, 796 F.2d at 829.

The district court's order is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CASE NO. 91-C-1411

RONALD H. RILEY,

Plaintiff,

v.

KINGSLEY UNDERWRITING AGENCIES, LTD., et al.,

Defendants.

ORDER

CARRIGAN, J.

Plaintiff Ronald H. Riley commenced this action asserting claims under federal and state securities law as well as state tort law. Defendants are: (1) Society and Counsel of Lloyd's (Lloyd's), a British entity; (2) First-Bank of Vail, Colorado (FirstBank), a federally chartered bank registered to do business in Colorado; (3) Robin C. Kingsley and Robert Hallam, both British citizens; and (4) Kingsley Underwriting Agencies, Ltd., Lime Street Underwriting Agencies, Ltd., and Bankside Syndicate Limited, all British Corporations. Jurisdiction is alleged to exist under 28 U.S.C. § 1331 as well as this court's pendent jurisdiction.

On August 20, 1991, I granted the plaintiff's motion for temporary restraining order, prohibiting the defendants from drawing down certain letters of credit. Prior

to the preliminary injunction hearing held today, the parties briefed the issues: (1) whether the choice of forum and law clauses in Riley's contract with Lloyd's choosing England's courts and law are valid and enforceable; and (2) whether Riley's contract with the other British defendants requiring arbitration in England and agreeing to be bound by English law is valid and enforceable.

After reading the briefs and hearing argument in open court, I held that the arbitration, choice of forum and choice of law provisions of the contracts are valid and enforceable. As a result of that decision, this court does not have jurisdiction, and therefore the plaintiff's claims and action as against Lloyd's, Kingsley Underwriting Agencies, Ltd., Lime Street Underwriting Agencies, Ltd., Bankside Syndicate Limited, Kingsley and Hallam must be dismissed without prejudice.

The sole remaining defendant is FirstBank against whom the plaintiff seeks only injunctive relief. Pursuant to Fed. R. Civ. P. 65, however, the ten day period of the temporary restraining order prohibiting FirstBank from paying under its letter of credit has elapsed. In open court, I denied the plaintiff's motion for preliminary injunction. Because the complaint seeks no other relief as against FirstBank, the plaintiff's claims and action as against FirstBank are dismissed without prejudice.

Accordingly, IT IS ORDERED that:

(1) the plaintiff's motion for preliminary injunction is denied;

(2) the plaintiff's claims and action as against the Society and Counsel of Lloyd's, Kingsley Underwriting Agencies, Ltd., Lime

Street Underwriting Agencies, Ltd., Bankside Syndicate Limited, Robin C. Kingsley and Robert Hallam are dismissed without prejudice; and

(3) the plaintiff's claims and action as against FirstBank of Vail are dismissed without prejudice.

Dated at Denver, Colorado August 30, 1991. (4:20 p.m.)

BY THE COURT:

/s/ Jim R. Carrigan
JIM R. CARRIGAN
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE JIM R. CARRIGAN

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the Order signed by Judge Carrigan to:

Richard G. Sander, Esq.
1200 17th St., #2400
Denver, CO 80202

Neil Peck, Esq.
370 17th St., Suite 4700
Denver, CO 80201

Stephen T. Johnson, Esq.
1200 17th St., #3000
Denver, CO 80202

/s/ Pat Cordova
Deputy Clerk

Dated: August 30, 1991

Re: 91-C-1411

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHARLES ROBERT LESLIE Plaintiff VS. LLOYD'S OF LONDON, a/k/a LLOYD'S, a/k/a THE CORPORATION OF LLOYD'S, a/k/a THE COMMITTEE OF LLOYD'S, a/k/a THE SOCIETY OF LLOYD'S, and R. W. STURGE & CO., a/k/a R. W. STURGE LTD., Defendants.	)	CIVIL ACTION NO. H-90-1907 JURY TRIAL DEMANDED

MEMORANDUM & RECOMMENDATION REGARDING LLOYD'S OF LONDON'S MOTION TO DISMISS

Before the Court is Defendant "Lloyd's of London's" Motion to Dismiss under Rules 9(b); 12(b)(1), (2), and (6); and Doctrines of International Comity and Forum Non Conveniens. The parties and the Court have agreed to defer discovery on the issue of personal jurisdiction until the other issues presented in this motion have been resolved. This memorandum and recommendation does not, therefore, address the matter of Rule 12(b)(2) personal jurisdiction.

As to dismissal under Federal Rules of Civil Procedure 9(b), 12(b)(1) and (6), international comity and

forum non conveniens, the Court recommends, after considering the pleadings on file and relevant law, that Defendant's motion be DENIED.

I. BACKGROUND

In Houston in the spring of 1976, a director of R. W. Sturge & Co., Charles E. Parnell, solicited Texas resident Charles Robert Leslie for participation in an investment contract to underwrite insurance risks through Lloyd's of London. Participation required that Leslie apply and qualify for membership in Lloyd's, a process which he completed by January 1, 1977, when, having posted a letter of credit in Lloyd's favor through a Texas bank and having accepted liability to the entire extent of his personal estate, he signed documents in London and became an underwriting member, or "Name."

As a Name, Leslie was required to enter into an underwriting agency agreement through which he would participate in syndicates. The syndicates, regulated by Lloyd's, assess risks and sell policies and contracts of insurance which Lloyd's ultimately approves and issues. Leslie chose to sign an underwriting agency agreement with R. W. Sturge, who arranged for him to participate in six syndicates managed by Sturge, and three others managed by R. H. M. Outhwaite and Posgate & Denby Agencies Limited.

Syndicates Outhwaite 317 and Outhwaite 661, in which Leslie participated, eventually wrote reinsurance policies on asbestos and other long-term pollution risks which have suffered escalating losses. Repeated "calls" have been made on Leslie and Outhwaite's other Names

to cover shortfalls. In addition, several other syndicates in which Leslie has participated have failed to close their accounting periods at the end of the usual three-year period, leaving its Names liable indefinitely. Litigation against these and various other syndicates by hundreds of Names is ongoing in London for breach of contract on issues related to the closing, and in some cases reopening, of accounting periods. Lloyd's is not a defendant in that case.

Relying on representations made to him, Leslie believed that he could limit his liability by resigning from a syndicate at the close of its three-year accounting period. He says he was not told that account years could remain open longer than three years nor that, while he can resign, he nevertheless remains liable indefinitely for all policies written while he was a member of a syndicate that retains open years of account. Leslie declares that he would never have become a member of Lloyd's if this information had not been misrepresented or omitted by Lloyd's and those who solicited his participation.

In the present action, Charles Robert Leslie claims that Lloyd's of London and R. W. Sturge & Co. engaged in deceptive trade practices in violation of the Texas Deceptive Trade Practices Act, Tex.Bus.Com.Code § 17.01 et seq. § 10(b) of the 1934 Securities and Exchange Act, 15 U.S.C. § 78j, and Rule 10b-5 promulgated pursuant to the latter statute, when they solicited his membership in Texas. Leslie also complains that Lloyd's and Sturge breached their fiduciary duties to him as an underwriting member when they included him in "outsider" syndicates into which Sturge syndicates were, with Lloyd's approval or acquiescence, ceding policies with extensive liability

exposure, thus insulating "insider" members of these Sturge syndicates from the same risks. Leslie cites Sturge's conflict of interest in managing the interests of both "insider" and "outsider" members, and in Lloyd's failure to ensure that risk was being distributed according to its own policies. Leslie further notes the conflict of interest on the part of directors or members of the management Committee of Lloyd's who were at the same time underwriting agents in syndicates that channelled problem risks into "outsider" syndicates.

Lloyd's, in its defense, characterizes itself as an insurance regulatory agency rather than a business entity, eschewing any responsibility or interest in the solicitation of new members, a matter it says is solely carried out by managing agencies such as Sturge for their own interests. Lloyd's maintains that it does not itself profit from this acquisition of new members, which is the direct result of the agencies' solicitation efforts, even though its very organization depends on such members.

II. DISCUSSION

A. Choice of Law

At the threshold, we must decide whether this case should be dismissed because, as Lloyd's of London claims, English law rather than domestic law applies.

1. Forum-Selection Clauses

Defendant Lloyd's resists subject matter jurisdiction on the grounds that his General Undertaking contract with Leslie contains choice-of-law and forum-selection

clauses designating England as the place and English law as the means for settling disputes "arising out of or relating to the Member's membership." We note that such clauses do not deprive a federal court of subject matter jurisdiction, but "merely constitute[] a stipulation in which the parties join in asking the court to give effect to their agreement by declining to exercise its jurisdiction," *LFC Lessors, Inc. v. Pac. Sewer Maintenance*, 739 F.2d 4, 6 (1st Cir. 1984), *citing Cent. Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341, 345 (3rd Cir. 1966). We find it convenient to consider the applicability of these clauses at the outset.

The General Undertaking containing the choice-of-law and forum-selection clauses which Lloyd's seeks to enforce was formulated when Lloyd's was restructured in 1982. It was signed in 1986 to replace the original 1976 contract between the parties which contained no such clauses. According to Leslie's allegations, he believed he was required to sign the 1986 replacement contract if he wished to continue his underwriting activity with Lloyd's, and he thought Lloyd's would call his letter of credit if he did not. He did not attempt to negotiate the new terms because, he declares, they were presented to him to sign as part of a predetermined package. Given the circumstances surrounding the signing of the amendment and the fact that the originally negotiated contract omitted such terms, we believe the 1986 document can be characterized as an adhesion contract.

While recognizing the strong policy in favor of enforcing forum-selection clauses articulated in the case law beginning with *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907 (1972), the facts alleged by Leslie

dictate a result contrary to the policy. This is not a case where foreign plaintiffs come forum-shopping into United States courts. Nor is it a case where a resident has willfully traveled to another jurisdiction to initiate and conduct business transactions. It is a case where defendants come to Texas, and will in all likelihood continue to do so, to solicit local investors to participate in foreign commercial operations. It would be unreasonable to allow such defendants to avoid local laws requiring accurate and complete representation of their product, as all others who sell investments locally are required to do, by simply including forum-selection clauses in form contracts.

Bremen, itself, made exception for enforcing forum-selection clauses where "enforcement would be unreasonable and unjust, or . . . for such reasons as fraud. . . . " 407 U.S. at 15, 92 S.Ct. at 1916. Leslie's claim of fraud in the inducement provides additional compelling reasons to disregard the forum-selection clause.

It could be argued, further, that the clauses in the General Undertaking of 1986 refer to disputes relating to Leslie's membership, and that his claims in the present case arise from events that occurred before he was a member, making the selection clauses inapplicable to the present case. For all of the above reasons, we determine that the forum-selection and choice-of-law clauses in the Leslie-Lloyd's contract do not apply to the facts before us.

2. The Most Significant Relationship Test

Lloyd's argues that English law rather than Texas law applies to this case in that the Texas Supreme Court adopted the "most significant relationship" choice-of-law test as set out in *Duncan v. Cessna Aircraft*, 665 S.W. 2d 414, 419-22 (Tex. 1984), and that England bears the most significant relationships to this case. In regard to the "most significant relationship" test, we note that the claims in the case before us concern solicitation of a Texas plaintiff, in Texas, by and for the benefit of defendants. While it is true that many other circumstances connected with this case took place elsewhere, it is the initial solicitation which forms the basis of the complaint in this case. That solicitation took place in Texas. Lloyd's characterization of the present case as a broad litigation covering all wrongs in any way arising out of the entire relationship between the parties is simply inaccurate. The fact that unrelated or peripheral events occurred elsewhere is immaterial.

Leslie's basic complaint is that Lloyd's violated federal and state laws by misrepresenting certain facts in its solicitation, in Texas, of Leslie for membership. Texas has a direct interest in protecting its citizens against this type of alleged wrongdoing, whether perpetuated by fellow citizens or by foreigners. Indeed, it has specifically passed laws toward that end, and state policies are at stake here. We can conceive of no similar interest that England might have in this matter. The most significant relationship is with Texas in this case, and Texas law should apply.

B. The Rule 12 Motions to Dismiss

In considering Rule 12 motions to dismiss, the Court must accept the facts appearing on the face of the complaint as true, and consider them along with such reasonable inferences as may be drawn in complainant's favor. *Scheuer v. Rhodes*, 416 U.S. 232 at 236, 94 S.Ct. 1683 at 1686 (1974); *Jamieson By and Through Jamieson v. Shaw*, 772 F.2d 1205 at 1207 (5th Cir. 1985). The purpose of a motion to dismiss "is merely to assess the legal feasibility of the complaint under Rule 8(a), not to assay the weight of the evidence which might be offered in support thereof." *Geisler v. Petrocelli*, 616 F.2d 636, 639 (2nd Cir. 1980).

1. Subject Matter Jurisdiction

a. Diversity Jurisdiction

Charles Robert Leslie is a resident of the State of Texas. Lloyd's of London and Sturge & Co. are subjects of a foreign state. Leslie pleads an amount in controversy which exceeds $50,000. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332.

b. Federal Question Jurisdiction

Jurisdiction will also lie under 28 U.S.C. § 1331 in that a claim for violation of the Securities and Exchange Act of 1934 arises under the laws of the United States, unless, as Lloyd's of London contends, Section 30(b) of the Act does not apply to transactions "wholly outside of the United States."

c. Jurisdiction Under the Facts

The present case involves a Texas plaintiff and an English defendant who engaged in an international transaction, originally solicited in the United States, but finalized and largely carried out in England. Although these facts do not characterize a transaction carried out entirely outside of our jurisdiction, we examine the case law previously addressing the issue.

"A finding of jurisdiction will depend upon the analysis of the particular facts in any given case," *Continental Grain Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409 (9th Cir. 1979). None of the case law cited in support of Lloyd's position to dismiss on jurisdictional grounds addresses precisely the facts at hand. *MCG, Inc. v. Great W. Energy Corp.*, 896 F.2d 170 (5th Cir. 1990), involved American plaintiffs who characterized themselves as foreign in order to avoid SEC law and purchase foreign securities. The Court disallowed jurisdiction to such a plaintiff; yet it noted that there might indeed be claims involving fraud where circumstances would dictate subject matter jurisdiction. *MCG* at 173.

Courts, in other cases, have examined the conduct of the defendant and the place of that conduct, the effect of the conduct and the location of the effect, and yet have not been able to design a "test" capable of covering the vast factual possibilities, including those in this case. The court in *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1337 (2nd Cir. 1962), asked

> whether, if Congress had thought about the point, it would not have wished to protect an American investor if a foreigner comes to the

> United States and fraudulently induces him to purchase foreign securities abroad – a purpose which its words can fairly be held to embrace.

We believe that such investors are to be protected. It defies reason to suppose otherwise.

2. Failure to State a Claim

In considering whether this complaint should be dismissed for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), we follow the standard enunciated by the Supreme Court that, dismissal being a drastic measure, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99 (1957). Rule 12(b)(6) "is a disfavored motion and is rarely granted." *Sosa v. Coleman*, 646 F.2d 991, 993 (5th Cir. 1981).

In its inquiry, the court is limited to the content of the complaint. Reliance on extraneous submissions such as affidavits or depositions would convert a motion to dismiss into one for summary judgment. Fed. R. Civ. P. 12(b). The Court, however, may exercise its discretion to determine whether or not to accept material beyond the pleadings. *Isquith v. Middle South Utilities*, 847 F.2d 186, 193 n. 3 (5th Cir. 1988), *cert. denied*, 109 S.Ct. 310 (1988). We decline to do so in arriving at our recommendations here, and treat this as a motion to dismiss for failure to state a claim.

Having already determined that domestic law applies here, we now consider whether Leslie's allegations concerning its transactions with Lloyd's and Sturge state a claim under the Texas Deceptive Trade Practices and Consumer Protection Act and the Securities and Exchange Act of 1934.

a. The Deceptive Trade Practices Claim

The Texas Deceptive Trade Practices – Consumer Protection Act (DTPA) provides protection to a consumer, defined as an "individual . . . who . . . acquires by purchase or lease, any goods or services," against "[f]alse, misleading or deceptive acts or practices in the conduct of any trade or commerce. . . . " Tex. Bus. Com. Code Ann. §§ 17.46 and 17.50. The complaint in this case alleges that Leslie sought to acquire services from Lloyd's in the form of regulation and oversight of the underwriting agents who would manage the business of selling insurance contracts and policies for him, and that representations made to him in the course of the sale were false and misleading, to his detriment.

Accepting Leslie's allegations as true, and assuming that his business transaction with Lloyd's is indeed of a type that qualifies him to be a consumer under the Act, it appears feasible that Leslie can present facts which would entitle him to relief. That is all that is required to prevent dismissal of his DTPA claim.

Leslie characterizes his contract with Lloyd's as an investment contract, which under the Securities Exchange Act of 1934 qualifies as a security which it may regulate,

thereby bringing his claim within the bounds of the SEC, as we discuss in more detail below. Texas courts have consistently regarded securities as neither goods nor services under the DTPA. *Portland Savings & Loan Assoc. v. Bevill, Bresler & Schulman Gov't Securities, Inc.*, 619 S.W.2d, 241, 245 (Tex.Civ.App. – Corpus Christi 1981, no writ). Lloyd's contends, therefore, that Leslie has no claim under the Texas DTPA.

Texas case law has, however, recognized that causes of action for both securities fraud and violation of the DTPA may arise from the same transaction, and that mere characterization of a transaction as a security does not necessarily preempt recovery under the DTPA. *Nottingham v. Gen. Am. Communications Corp.*, 811 F.2d 878 (5th Cir. 1987); *FDIC v. Munn*, 804 F.2d 860 (5th Cir. 1986); *Frizzell v. Cook*, 790 S.W.2d 41 (Tex.App. – San Antonio 1990). Collateral services which relate to the sale of a security may be covered by the DTPA when those services are also objectives of the transaction and not just incidental to the investment. Munn at 865. Leslie claims that he sought from Lloyd's the collateral services of supervision and regulation of the underwriting agencies with whom he contracted, that Lloyd's represented that they would provide such services and that such representations proved to be false, to Leslie's detriment. Accepting these allegations as true, it does not appear beyond doubt that Leslie can prove no set of facts under a DTPA claim which would entitle him to relief, and the Court may not dismiss this claim.

Lloyd's also claims that the DTPA two-year statute of limitations has run on Leslie. Tex.Bus. & Com. Code Ann. § 17.565 (Vernon Supp. 1989). A reading of the statute

reveals that an action brought under the DTPA must be "commenced within two years after the date on which the . . . consumer discovered the occurrence of the false, misleading, or deceptive act or practice." The date on which Leslie so discovered is a fact question which we cannot resolve. Nevertheless, the allegations in the complaint lead us to surmise that Leslie may not have discovered his deception until he attempted to resign from troubled syndicates, and that such discovery falls well within the statute.

Further, Lloyd's claims that Leslie has failed to comply with the mandatory notice provisions of § 17.505 of the Act. We note the case law in support of the contention that failure of timely notice requires abatement of the case in order to comply rather than dismissal. *Int'l Nickel v. Trammel Crow Distrib. Corp.*, 803 F.2d 150 (5th Cir. 1986); *Star-Tel., Inc. v. Nacogdoches Tele., Inc.*, 755 S.W.2d 146 (Tex.App. – Houston [1st Dist.] 1988, no writ). Dismissal of the case is not proper on the facts before us.

b. The Securities Exchange Act Claim

An investment contract is a security under the Securities and Exchange Act of 1934. An investment contract is one which is 1) an investment, 2) in a common enterprise, 3) with a reasonable expectation of profits, 4) to be derived from the entrepreneurial or managerial efforts of others. *SEC v. W. J. Howey Co.*, 328 U.S. 293, 66 S.Ct. 1100 (1946).

Leslie invested in his membership in Lloyd's by paying an entrance fee as well as annual dues so that he

could participate in underwriting insurance issued by Lloyd's of London. He participated in a common enterprise in which he gained the right to participate while Lloyd's received fees. There was an expectation of profits by both parties, to be derived from Lloyd's providing supervisory and regulatory services and from Leslie through the contribution of investment capital. According to the allegations, Leslie's membership in Lloyd's meets the requirements of an investment contract.

C. Pleading Fraud with Sufficient Particularity

Federal Rule of Civil Procedure 9(b) requires particularity in pleading the circumstances constituting a claim of fraud, such as Leslie's claim under Rule 10b-5 of the Securities Exchange Act. Leslie's complaint states that false representations or omissions of material fact occurred in 1976 when he was being solicited for membership in Lloyd's, which can be characterized as an investment contract, and afterward; that these occurred in Texas; that he was not told of the extent of his possible liability; that Charles E. Parnell of Sturge & Co. and Lloyd's misrepresented or omitted crucial facts; and that through such omissions or misrepresentations, they obtained his membership in Lloyd's of London and participation in an investment contract. This is sufficient to apprise us of the circumstances required by Rule 9(b).

Should it be required that Leslie plead the elements of common-law fraud in order to comply with the Rule, we note that he has alleged at least the following: 1) false representations of material fact concerning the extent of his possible liability in underwriting insurance risks as a

member of Lloyd's; 2) knowledge by the parties making representations to Leslie about his potential liability of the realities of their statements or omissions; 3) reliance by Leslie on the statements or omissions; 4) intent on the part of Sturge and Lloyd's that action should be taken by Leslie on the basis of their representations, or omission thereof; and 5) detriment to Leslie because of his reliance on the representations or omissions. This is enough to constitute a claim for common-law fraud.

D. Forum Non Conveniens

A defendant's burden on a motion to dismiss in favor of a foreign court is a strong one, and dismissal is clearly the exception. A plaintiff's choice will rarely be disturbed. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839 (1949).

Dismissal on the grounds of forum non conveniens requires, first, that there be an alternative forum in which the suit can be maintained, and second, that this forum be significantly more convenient. The plaintiff's forum will only be overcome when both private and public interest factors point toward the alternative forum. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S.Ct. 352 (1981).

London, England is the alternative forum presented to us under the facts of this case. Because the claims presented here are largely dependent on Texas and United States law, that choice is not ideal. We need not decide whether it is so unsatisfactory that it cannot be deemed an adequate alternative because the element of convenience and both private and public interest weigh

heavily on the side of rejecting Lloyd's motion to transfer this case to England.

In examining the private factors at play under the facts of the present case, we find no advantage in taking this case to England. Sources of proof may be found both in the United States and in Britain. Witnesses are likely to be found in both locations, and can equally be accessed. The cost of transporting evidence and witnesses overseas are more easily borne by a large business entity such as Lloyd's than by an individual plaintiff such as Leslie. The conflict of laws problem, where plaintiff's allegations concern violations of United States and Texas law in Texas, are largely avoided by remaining in the Texas setting.

Public factors weigh heavily in favor of maintaining the suit in Texas. Numerous residents of Texas are underwriting members of Lloyd's, and it can be anticipated that others will be solicited for membership in Texas, as well as in other states, in the future. The terms under which Lloyd's and Sturge's can gain such membership within the jurisdiction are of both national and community interest. Likewise, citizens' access to a forum in which they can redress wrongs is an important and abiding public concern. These factors determine that this case should not be dismissed on the basis of forum non conveniens.

E. International Comity

Lloyd's argues that respect for the integrity of the English judicial system and enforcement of judgments

requires this court to stay its hand and resolve this dispute in England. Behind this request is the fact that Leslie is a party to *Stockwell v. R. H. M. Outhwaite*, 1989 Folio 2729 (Q.B. Comm'l Ct.: 1989.) now pending in London.

The Stockwell litigation was brought by hundreds of Names against various underwriting agencies in regard to the manner in which the agents handled their insurance underwriting activities and accounts. Lloyd's is not a party to that litigation. Although Stockwell and the present case both grow out of the same basic relationships, they do not address identical issues. The Stockwell outcome will neither address nor resolve the matter of the solicitation of Leslie for Lloyd's membership in Texas, under United States and Texas law.

International comity does not require that this Court stay its hand. The present case in no way jeopardizes the London litigation, nor does the litigation affect the present case.

III. CONCLUSION

For the foregoing reasons, it is RECOMMENDED that Lloyd's Motion to Dismiss be DENIED.

The Clerk shall file this instrument and mail a copy to all parties. Within 10 days after being served with a copy, any party may file written objections pursuant to 28 U.S.C. § 636(b)(1)(C), General Order 80-5, S.D. Texas. Failure to file objections within such period shall bar an aggrieved party from attacking factual findings on appeal. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982) (en banc); *Ware v. King*, 694 F.2d 89 (5th Cir. 1982); *Thomas*

v. Arn, 474 U.S. 140, 106 S. Ct. 466 (1985). The original of any written objections shall be filed with the U.S. District Clerk, P.O. Box 61010, Houston, Texas 77208 and a copy shall be delivered to the Chambers of Judge Rainey, Room 8613 and to the Chambers of Judge Stacy, Room 7525.

Signed at Houston, Texas on this the ___ day of May, 1991.

/s/ _____
FRANCES H. STACY
UNITED STATES
MAGISTRATE JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHARLES ROBERT LESLIE Plaintiff VS. LLOYD'S OF LONDON, a/k/a LLOYD'S, a/k/a THE CORPORATION OF LLOYD'S, a/k/a THE COMMITTEE OF LLOYD'S, a/k/a THE SOCIETY OF LLOYD'S, and R. W. STURGE & CO., a/k/a R. W. STURGE LTD., Defendants.	)	CIVIL ACTION NO. H-90-1907

MEMORANDUM & ORDER

This 4th day of September, 1991, the defendants' objections filed by Lloyd's of London and R.W. Sturge, came on for ruling by the Court. The Court has reviewed Magistrate Stacy's rulings on the pending Motion to Dismiss. After a thorough review of the motions responses of Lloyd's and R.W. Sturge and the rulings of the magistrate, this Court finds that the Magistrate's ruling is appropriate and should be affirmed.

STANDARD OF REVIEW

The matters to which the Defendant has objected were referred to Magistrate Frances H. Stacy pursuant to

the Magistrate's Act contained in Title 28 § 631, *et seq.* Specific authority for this type of referral is granted by Title 28 § 636(b)(1)(A). Rule 72 of the Fed.R.Civ.P. as amended in 1983 governs the conduct of review of objections to Magistrate's Rulings. Federal Rules of Civil Procedure 72(a) requires the Court to "modify or set aside any portion of the Magistrate's Order found to be *clearly erroneous or contrary to law.*" The rule and the Magistrate's Act clearly contemplate the District Court granting great deference to the Magistrate's actions as long as the Magistrate's decision is not "clearly erroneous or contrary to law." Although the Act provides for a de novo review by the District Judge, the threshold requirement on any party raising objections to a Magistrate's rulings is to point out specifically where the Magistrate's decision is either clearly erroneous on the facts or contrary to law on the basis of existing case law. This Court is firmly committed to the concept that:

> "Defendants bear a heavy burden. The court may reconsider discovery matters referred to a Magistrate pursuant to Sections 636(b)(1)(A) of Title 28, if the Magistrate's rulings are 'clearly erroneous or contrary to law.' Moreover, in resolving discovery disputes, the Magistrate is afforded broad discretion, which will be overruled only if abused."

City Corp. v. InterBank Card Association, 478 F.Supp. 756, 765 (S.D.N.Y. 1979).

ANALYSIS

The defendant filed nineteen objections focusing on the alleged representations by Sturge in the United States

as to their relationship with Lloyds and the workings of the insurance syndication's process in England. Sturge's alleged representations in the United States were sufficient to constitute a violation of Security and Exchange Rule 10(b)(5). The federal courts have nearly unanimously held that 10(b)(5) violations occurring in the United States are sufficient basis for federal court jurisdiction.

Furthermore, Sturge's alleged representations when combined with Lloyds' conduct which could be construed as affirming or adopting Sturge's apparent agency relationship with Lloyd's, raise the possibility of the imposition on Lloyd's of liability for Sturge's conduct. The Magistrates recommendation of denial of the motion to dismiss is appropriate.

This Court therefore finds that the Magistrates recommendations are well founded in State and Federal law, and the Magistrate's ruling should be and hereby is AFFIRMED.

The clerk shall enter this order and furnish a copy to all parties.

Signed this 4th day of September, 1991 at Houston, Texas.

/s/ _____
JOHN D. RAINEY
UNITED STATES
DISTRICT JUDGE

No. 92-664

Supreme Court, U.S.
FILED
NOV 12 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

RONALD H. RILEY,

Petitioner,

—v.—

KINGSLEY UNDERWRITING AGENCIES, LTD., A BRITISH CORPORATION, LIME STREET UNDERWRITING AGENCIES, LTD., A BRITISH CORPORATION, BANKSIDE SYNDICATE LIMITED, A BRITISH CORPORATION, FIRSTBANK OF VAIL, N.A., ROBIN C. KINGSLEY, ROBERT HALLAM, SOCIETY AND COUNCIL OF LLOYD'S, AND JOHN DOES I THROUGH X,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER QUESTIONS PRESENTED

1. Whether this Court's unbroken line of precedents favoring enforcement of choice of forum and choice of law clauses in international agreements warranted dismissal by the courts below of Petitioner's federal and state securities law and common law fraud claims against the Society and Council of Lloyd's of London and against Petitioner's Members' Agents at Lloyd's of London, arising out of Petitioner's membership in that English institution.

2. Whether the United Nations Convention on the Recognition and Enforcement of Arbitral Awards, to which both the United States and the United Kingdom are parties, and the emphatic federal policy favoring arbitration, require enforcement of Petitioner's commitment to arbitrate his disputes with his English Members' Agent at Lloyd's of London.

STATEMENT PURSUANT TO RULE 29.1

Respondents Kingsley Underwriting Agencies, Ltd., a British corporation, Lime Street Underwriting Agencies, Ltd., a British corporation, Bankside Syndicate, Ltd., a British corporation, and the Society and Council of Lloyd's, have no parent or subsidiary corporations within the meaning of Rule 29.1 of the Rules of the Supreme Court of the United States.

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COUNTERSTATEMENT OF THE FACTS

Respondent incorporates by reference the statement of facts in the opinion below (A-3-7).[1] The record also demonstrates the international character of Mr. Riley's becoming an underwriter at Lloyd's: he first met his Members' Agent in London; subsequently travelled to London for a formal interview with a member of the Lloyd's Council, or governing body, who inquired whether he understood that as a member he would be liable to the full extent of his net worth to pay claims on the insurance policies which his syndicates would underwrite.[2]

The alleged misrepresentations that led Petitioner to join Lloyd's in 1980 occurred between 1978 and 1980 (Complaint ¶¶ 39-57; Transcript of District Court proceedings, Aug. 20, 1991, at 11, 16 (pages 36 and 41 of Mr. Riley's Appendix filed with the Tenth Circuit)). His alleged "investment" in the unique market at Lloyd's was the purchase of a letter of credit, which varied in amounts from £150,000 to £350,000 over his eleven years of membership.

Petitioner errs in suggesting that the decision below deprives him of a right available to him under U.S. securities laws. When the Securities and Exchange Commission (the "SEC") in 1987 and 1988 reviewed the whole issue of offering membership in Lloyd's to United States persons, it concluded that if the Members' Agents solicited participation in Lloyd's in compliance with the procedures of the Commission's Regulation D, registration under the Securities Act was *not* required. To the SEC the security was the U.S. person's relationship with his

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1 Denotes reference to Appendix A to the Petition for Certiorari.

2 Before joining Lloyd's in 1979 he was given "An Introduction to Lloyd's Underwriting Membership" which stated, among other things, that:

> It must be stressed that Underwriting is a risk business and an Underwriting Member of Lloyd's has unlimited liability with regard to the share or risks accepted by each Syndicate in which he or she participates.

See Ex. 1 to the Supplemental Appendix, submitted by respondents to the Tenth Circuit.

Members' Agent, with the issuer being the particular Members' Agent involved. The SEC's position was reaffirmed in 1991. *See* letter of Aug. 5, 1991 from the Senior Associate Director of the SEC, which the respondents herein submitted to the Tenth Circuit as Ex. D to their brief in opposition to Mr. Riley's motion for injunction pending appeal, and which is attached hereto as pages RA-1-4.[3]

REASONS FOR DENYING THE PETITION

I.

There Is No Conflict Among Courts Of Appeal.

Federal District Courts sitting in Chicago and in New York have both recently decided cases brought by other U.S. members of Lloyd's in favor of Lloyd's and their Members' and Managing Agents on facts virtually identical to those in this case. *Bonny v. Society of Lloyd's*, 784 F. Supp. 1350 (N.D. Ill. 1992) (denying request for preliminary injunction), No. 91 C 5525, slip op. (N.D. Ill. May 29, 1992) (dismissing case) (the May 29 Order is attached hereto as Appendix B); *Roby v. Corporation of Lloyd's*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,971 (S.D.N.Y. Aug. 18, 1992). Consistent with this Court's teaching, each of those courts has dismissed the complaints before them, finding that the pre-dispute international agreements containing choice of forum and choice of law clauses ("Choice Clauses") as to Lloyd's, and the Arbitration Clause as to the Agents, were valid and enforceable. Those decisions are now on appeal to the Seventh and Second Circuits, respectively. The Seventh Circuit will hear oral argument in *Bonny* in December 1992; the Second Circuit will hear oral argument in *Roby* in January, 1993. The only disharmony with these decisions, and with this Court's precedents, is a single recommended decision of a Federal District Court magistrate judge in Houston, which antedated the complete analyses in *Roby*, *Bonny*, and the Tenth Circuit below. The Texas magis-

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3 "RA-____" denotes references to Respondents' Appendix.

trate judge recommended that a similar complaint not be dismissed (see Exhibit C to Petition); a district court judge has accepted that recommendation (see Exhibit D to Petition) but rehearing of that order has been sought and no decision on rehearing has yet been rendered. That district court decision conflicts with a contrary decision by its circuit court, which dismissed a similar Name's action against Lloyd's, prior to the time when Choice Clauses were included in membership contracts, on grounds of *forum non conveniens*.[4] *See Hirsch v. Oakeley Vaughan Underwriting, Ltd. and the Society, Council, and Corporation of Lloyd's*, No. 89-2563, unpublished slip opinion[5] (5th Cir. May 31, 1989), *cert. denied*, ___ U.S. ___, 111 S. Ct. 511 (1990).

Less than two years ago, this Court denied a petition for *certiorari* in the *Hirsch* case, cited above, on essentially the same alleged fact pattern as in the instant case. *Id.*

In a closely analogous ruling, the Circuit Court of Appeals for the First Circuit has recently affirmed that ordinary *forum non conveniens* considerations which would warrant dismissal in favor of the courts of a foreign country apply equally to actions brought under the United States securities laws, *Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944 (1st Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1172 (1992). *A fortiori*, international contractual agreements to achieve the same result should be honored.

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4 Accord: *Roby*, Fed. Sec. L. Rep. at p. 94,171; "The overwhelmingly English nature of this dispute likely also would warrant dismissal of the action on *forum non conveniens* grounds."

5 To the Fifth Circuit, *Hirsch* raised no important new issue but was "merely decide[d] . . . on the basis of well-settled principles of law. . . ." *Hirsch*, slip op. at 1 n.1. *See* the Appendix to the *Petition for Certiorari* in *Hirsch*, No. 90-519.

II.

The Decision Below Followed This Court's Consistent Holdings That Choice Clauses In International Agreements Must Be Upheld.

The court below, as have the courts in *Roby* and *Bonny*, merely applied the clearly articulated jurisprudence of this Court to the unique facts presented by contractual participation by foreign underwriters in the Lloyd's insurance market.[6]

Petitioner conceded below that "The enforcement of forum and choice of law clauses is consistent with recent U.S. Supreme Court decisions." A-8. When petitioner elected to become an insurance underwriter, he and Lloyd's agreed with one another that their respective rights and obligations would be "governed by and construed in accordance with the laws of England," and that any dispute would be settled in "the courts of England."[7] Petition at 9-10. These Choice Clauses were an integral part of a bargain which petitioner enjoyed for a number of years, and now seeks to repudiate. Attempts to evade such clauses have been thoroughly considered and solidly rebuffed by this Court in *M/S The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) and, just months ago, in *Carnival Cruise Lines, Inc. v. Shute*, ____ U.S. ____, 111 S.Ct. 1522 (1991).

In *The Bremen*, a contract for towing a drilling rig from Louisiana to Italy provided for judicial resolution of disputes in an English forum. In transit, the rig suffered storm damage and was towed to Tampa, Florida. In Florida the owner, like

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6 The singular and complicated structure of Lloyd's and the complex of agreements which defined petitioner's relationship at Lloyd's are set forth in *Roby* at p. 94,164-66.

7 "Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to [Riley's] membership of, and/or underwriting of insurance business at, Lloyd's." A-4.

petitioner herein, "ignoring its contract promise to litigate 'any dispute arising' in the English courts," 407 U.S. at 3, filed suit in the United States district court. The district court denied a motion to dismiss, and the Court of Appeals affirmed, holding the forum-selection clause unenforceable on public policy grounds because the plaintiffs' claims would be subject to exculpatory clauses in England, but not in the United States where they were against public policy. This Court reversed. Pointing out the "expansion of overseas commercial activities by business enterprises based in the United States," 407 U.S. at 9, it observed:

> The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.

Chief Justice Burger explained the reasons guiding the Court's ruling as follows: first, as here, a number of jurisdictions could otherwise be the situs of suit, and the parties justifiably wished to avoid the uncertainty and inconvenience which could come to pass as a result. 407 U.S. at 13. Secondly, the choice-of-forum clause was a "vital part of the contract" (as the Choice Clauses certainly were here, embracing two of the three substantive paragraphs in the General Undertaking; *see* A-4-5) and the Court quoted with approval the statement of the English High Court of Justice that:

> [T]he force of an agreement for litigation in this country, freely entered into between two competent parties, seems to me to be very powerful.

407 U.S. at 14. Finally, this Court concluded with a strong endorsement of the forum-selection clause:

> Thus, in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside.

407 U.S. at 15.

In *Scherk*, a contract covering the sale of several German businesses and associated trademarks provided for arbitration in France as the forum with Illinois law as the applicable law. Like Petitioner, the American company sought to repudiate its contract, and filed suit in Illinois claiming violations of the Securities Exchange Act of 1934, 15 U.S.C. § 78a, *et seq*. The district court and the court of appeals held the choice clauses, in particular the arbitration clause, to be unenforceable. This Court again reversed, as it had in *The Bremen*. Speaking through Mr. Justice Stewart, this Court discussed its rationale for honoring choice clauses in international transactions. It emphasized the advantages to those engaged in international commerce in eliminating uncertainties in the applicable law, stating:

> Such uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.

417 U.S. at 516.

This Court rejected the post-contract forum shopping so vividly illustrated by the instant case:

> A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.

417 U.S. at 516-7. It reaffirmed the rationale and reasoning of *The Bremen*, 417 U.S. at 518.

This Court next decided *Mitsubishi*, a case that Judge Carrigan in the district court below saw as "squarely contrary" to petitioner's position. Transcript of district court proceedings,

Aug. 30, 1991, at 9 (page 186 of Mr. Riley's Tenth Circuit Appendix). *Mitsubishi* held that an agreement requiring arbitration in Japan is valid and enforceable and extends to statutory claims under the U.S. antitrust laws. In its analysis, this Court repeated, once more and in detail, the principles applicable to commercial transactions in international commerce, emphasizing the need for certainty and predictability in international dealings:

> [W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context. . . .
>
> Notwithstanding the possibility that the English court would enforce provisions in the towage contract exculpating the German party which an American court would refuse to enforce, this Court [in *The Bremen*] gave effect to the choice-of-forum clause.

473 U.S. at 629. The Court condemned reliance upon purely domestic policies as a ground for striking down a choice clause and summarized the law in these terms:

> *The Bremen* and *Scherk* establish a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions. Here, as in *Scherk*, that presumption is reinforced by the emphatic federal policy in favor of arbitral dispute resolution. And at least since this Nation's accession in 1970 to the Convention, see [1970] 21 U.S.T. 2517, T.I.A.S. 6997, and the implementation of the Convention in the same year by amendment of the Federal Arbitration Act, that federal policy applies with special force in the field of international commerce.

473 U.S. at 631. *Accord, Carnival Cruise Lines, supra*; *Development Bank of Philippines v. Chemtex Fibres, Inc.*, 617 F. Supp. 55, 57 n.12 (S.D.N.Y. 1985) (concluding from

Mitsubishi that "it is clear that the Convention does not contemplate the expression of local public policy as a barrier to the arbitrability of claims"); McLaughlin & Genevro, *Enforcement of Arbitral Awards Under the New York Convention—Practice in U.S. Courts*, 3 Int'l Tax & Bus. Law. 249, 260 n.69 (1986).

Under the principles articulated by this Court in *Mitsubishi*, the public policy doctrines launched by petitioner are ripe for application, if ever, only at the enforcement stage of arbitral or litigation proceedings. Footnote 19 disposed of the very argument which petitioner now makes in this Court, (based on his extrapolation of footnote 21 in the same opinion), namely that the court should refuse to enforce his Choice Clauses because holding them valid would result in a waiver of remedies under American law. Footnote 19 explained that an *amicus* brief had raised the issue that, because the agreement provided that the laws of Switzerland would govern, Swiss law rather than American antitrust law would be the law of decision. Noting that the arbitration panel had taken the antitrust claims under submission, the Court disposed of this argument by saying:

> We therefore have no occasion to speculate on this matter at this stage in the proceedings, when Mitsubishi seeks to enforce the agreement to arbitrate, not to enforce an award. Nor need we consider now the effect of an arbitral tribunal's failure to take cognizance of the statutory cause of action on the claimant's capacity to reinitiate suit in federal court.

473 U.S. at 637 n.19.

A similar result was reached in the context of a federal securities act case in *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985). In *Byrd*, this Court declined to override an arbitration clause based on the possible future preclusive effects on federal claims of a state arbitration proceeding, on the grounds that:

> The question of what preclusive effect, if any, the arbitration proceedings might have is not yet before us, however, and we do not decide it. The collateral-estoppel

> effect of an arbitration proceeding is at issue only after arbitration is completed, of course, and we therefore have no need to consider now whether the analysis in *McDonald* encompasses this case. Suffice it to say that in framing preclusion rules in this context, courts shall take into account the federal interests warranting protection. As a result, *there is no reason to require that district courts decline to compel arbitration, or manipulate the ordering of the resulting bifurcated proceedings, simply to avoid an infringement of federal interests.*

470 U.S. at 223 (emphasis added).

This principle applies to this case. Even though it is impossible to predict whether arbitration or litigation, in England under English laws, would ultimately infringe to an unacceptable degree upon Riley's claimed federal rights, the *Roby* court noted how unlikely was that prospect, *Roby supra* at p. 94,171:

> Although English law does not afford the treble damage provisions of RICO or the less rigorous elements of proof of the American securities laws, it does at a minimum offer a full panoply of common law remedies for the alleged behavior underlying all plaintiffs' claims. These remedies include equitable claims for rescission of fraudulently induced agreements and damages claims for negligent or fraudulent misrepresentation, or "deceit." Plaintiffs have conceded that these remedies are available as to the Managing and Members' Agents, who more directly interacted with plaintiffs than did other defendants, and, upon a stronger showing of scienter, as to Lloyd's. In addition, English securities regulations may be enforced against Lloyd's upon application by the government on behalf of a defrauded or misled purchaser of securities. Such remedies afford plaintiffs protection under the law; the English law which they earlier accepted merely is less advantageous than the American law that they now prefer. Under the circumstances, plaintiffs are not entitled to more.

The Tenth Circuit, whose review is sought here agreed:

> "Riley will not be deprived of his day in court. He may, though, have to structure his case differently than if proceeding in federal district court." A-11.

In dismissing securities claims brought by an American investor in favor of a Canadian forum, despite plaintiff's objections that such a dismissal was not proper unless it was first clear that the Canadian courts would apply U.S. securities laws, the Court of Appeals for the First Circuit stated:

> Trial in Canada will not deprive the plaintiff of relevant legal advantages. Canadian courts will either apply American law . . . ; or they will apply Canadian laws that offer shareholders somewhat similar protections by forbidding misrepresentation and fraud and imposing fiduciary obligations.

Howe v. Goldcorp Invs., Ltd., 946 F.2d 944, 952 (1st Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S. Ct. 1172 (1992) (citations omitted).

In the final analysis, *Mitsubishi* establishes two important and far reaching principles, which stand as beacons for the decision in the instant case. First, those who choose to engage in business on an international scale should expect that United States courts will enforce their contracts designating a particular forum for the resolution of disputes. Second, any attack which they believe they can make in our courts will be considered, if at all, only at the award enforcement stage, not when their choice clauses alone are at issue. On their face, the Choice Clauses in petitioner's agreements, utilized by underwriters from more than fifty countries, show that they were not based on any ulterior motive to evade any United States laws. They are of the type described by this Court as "indispensable" in foreign commerce, and as such, are favored with strong presumptions of enforceability, and applied "with special force in the field of international commerce." *Mitsubishi*, 473 U.S. at 631. Far from constituting a *sub rosa* "waiver," they support important public policy through a suite of beneficial effects,

including furtherance of international commerce, prompt and efficient resolution of disputes, predictability in choice of law, and recognition of private agreements freely entered into among the world's citizens. In denying the petition, this Court would be following its own strong line of precedents.

III.

The Convention On The Recognition And Enforcement Of Foreign Arbitral Awards Requires Enforcement Of The Arbitration Clause Of The Contract.

Decisions at every level of U.S. courts support the decisions below requiring enforcement of petitioner's agreements to arbitrate. This Court, in *Mitsubishi*, specifically considered whether enforcement of arbitration under the Convention was selective, that is, whether enforcement would be ordered with respect to some subjects but not to others, and squarely rejected petitioner's theory (*see* Petition at 18) that the non-waiver sections of the securities laws should, notwithstanding the Convention, be construed to release him from compliance with his contract to arbitrate. Again pointing to the need for mutual acceptance in the family of nations, 473 U.S. at 638, this Court concluded that it should not read exceptions into the Convention. Congress had intended the Convention to be all-inclusive:

> [I]n implementing the Convention by amendment to the Federal Arbitration Act, Congress did not specify any matters it intended to exclude from its scope.
>
> * * *
>
> [W]e decline to subvert the spirit of the United States' accession to the Convention by recognizing subject-matter exceptions where Congress has not expressly directed the courts to do so.

473 U.S. at 639 n.21.

Under the leadership of this Court, court after court has enforced arbitration agreements under the Convention, following this Court's lead in the *Scherk* securities case. *David L. Threlkeld & Co. v. Metallgesellschaft Ltd. (London)*, 923 F.2d 245, 248 (2d Cir.), *cert. dismissed*, ____ U.S. ____, 115 L. Ed. 2d 104 (1991) (Convention "makes it clear that the liberal federal arbitration policy 'applies with special force in the field of international commerce' ");[8] *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186-87 (1st Cir. 1982) (when a district court finds, after "a very limited inquiry" that the requirements of the Convention are fulfilled, "then it *must* order arbitration unless it finds the agreement 'null and void, inoperative or incapable of being performed' ") (emphasis in original); *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032, 1037 (3d Cir. 1974) ("There is nothing discretionary about article II(3) of the Convention. It states that district courts *shall* at the request of a party to an arbitration agreement refer the parties to arbitration") (emphasis in original); *Gates Energy Prods. v. Uyasa Battery Co.*, 599 F. Supp. 368, 371 (D. Colo. 1971) (directing arbitration in Japan under the Convention).

Since the beginning of this calendar year a number of cases involving the enforceability of arbitration clauses under the Convention have been decided and, consistently with the Lloyd's decisions, every one has compelled the arbitration of claims. *See Siderman de Blake v. Republic of Argentina*, 965

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8 London stands at the very top of the list as a locale for resolution of international disputes through arbitration:

> Due to its historic position in international trade and the repute of its legal system, [England] has for long been a world centre for the settlement of international commercial disputes. Our arbitration law was fully developed by the middle of the last century, and owing to the world-wide use of English standard forms of contract in many fields, most of which provide for arbitration here, it is probably still the most important single arbitration centre in the world, in the same way as the Commercial Court is almost certainly the most widely used single court for international commercial litigation.

Kerr, *International Arbitration v. Litigation*, 1980 J. Bus. Law 164, 178 (1980).

F.2d 699 (9th Cir. 1992); *Ministry of Defense of the Islamic Republic v. Gould, Inc.*, 969 F.2d 764 (9th Cir. 1992); *McDermott Int'l, Inc. v. Underwriters at Lloyd's*, 947 F.2d 1489 (E.D. La. 1992); *Interamerican Trade Corp. v. Companhia Fabricadora de Pecas*, 973 F.2d 487 (6th Cir. 1992); *Paper Express, Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753 (7th Cir. 1992); *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 1229 (S.D.N.Y. 1992).

Underlying this Court's decisions is the recognition that, in order for the Convention to be effective, the courts of many lands must work in concert to enforce it at every step of the way. Each nation must surrender its individual particularized interests in order that its citizens may be the beneficiaries of the advantages of international arbitration as a facilitator of commerce. In the early days of the Convention, concerns were expressed that the "public policy" exception in Article V(2)(b) would, given its vagueness and the multiplicity of interests which could fall into its ambit, become a loophole which would prevent the Convention from being effective. Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 Sw. U.L. Rev. 1, 13 (1971). However, after more than thirty years of experience internationally, and more than twenty years of United States' commitment, these fears have not been realized. The courts of the signatory nations, including the United States, have honored the need for reciprocity among nations, and have been vigilant in guarding against creating exceptions to enforcement which would overwhelm the philosophy of mutual enforcement so necessary to make the Convention a living commercial force. Martinez, *Recognition and Enforcement of International Arbitral Awards Under the United Nations Convention of 1958: The "Refusal Provisions"*, 24 Int'l Law. 487, 508-09, 516 (1990); Richard, *Enforcement of Foreign Arbitral Awards Under the United States Convention of 1958: A Survey of Recent Federal Case Law*, 11 Md. J. Int'l L. & Trade 13, 15, 42-44 (1987).

Accordingly, this Court should deny petitioner's request (Petition at 13-17) to review whether *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) and *Rodriguez de Ouijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), should be read to preclude arbitration where arbitration might deny "substantive" rights.

The *McMahon* court brought both RICO and Rule 10(b)-5 claims within the arbitration clause between the parties, relying on the strong policies favoring arbitration articulated in *Scherk* and other cases, and holding that the arbitration forum was adequate to protect substantive rights. The court specifically rejected the argument that enforcement would effect a waiver of rights under section 29(a) of the Securities Exchange Act of 1934.

In *Rodriguez*, two years later, this Court drove the final nail in the coffin of the argument that arbitration was unsuitable for the resolution of securities claims in general, and claims under the Securities Act of 1933 in particular. Overruling any remaining part of *Wilko v. Swan*, 346 U.S. 427 (1953), and drawing upon its recent long line of decisions giving ever-increasing viability to the arbitral process, the Court refused to strike down arbitration on the theory of voidness under section 14 of the Securities Act of 1933.[9]

Moreover, upholding domestic arbitration as they did, neither decision put upon the scales the even stronger policies favoring arbitration in the international field. *See Scherk*, 417 U.S. at 515, where this Court held that an international contract "involves considerations and policies significantly different from those controlling in [the domestic arbitration case of]

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9 After *Rodriguez*, this Court has continued to eliminate barriers to domestic arbitration in *Gilmer v. Interstate/Johnson Lane Corp.*, ___ U.S. ___, 111 St. Ct. 1647 (1991) and *Dean Witter Reynolds, Inc. v. Alford*, ___ U.S. ___, 111 S. Ct. 2050 (1991), which held for the first time that claims for age discrimination and sex discrimination, respectively, are arbitrable. Congress continued to eliminate such barriers by the enactment of 35 U.S.C. § 294, providing for the submission of patent claims to arbitration.

Wilko." Nor did this Court consider the Congressional intent to further arbitration as manifested in the Convention or the 1970 amendment to the Federal Arbitration Act—which made no exception for securities claims even though Congress was obviously aware of them and their importance relative to other claims which would become subject to arbitration in foreign lands. When these factors are added to the *McMahon* and *Rodriguez* endorsement of domestic arbitration as a forum for resolving securities act claims, it becomes apparent that the international agreement in this case should be enforced. *See Mitsubishi*, holding that international arbitration agreements would be enforceable "even assuming that a contrary result would be forthcoming in a domestic context." 473 U.S. at 629.

The petitioner herein asks this Court to overturn not only its own strong precedents, but every tenet of modern jurisprudence considering the Convention; to demonstrate the unwillingness of the United States to act in furtherance of a global necessity and then to invite the courts of all other nations to do the same. Petitioner would deprive the business interests of this country of the many advantages of a smooth-working and reciprocal mechanism of international dispute resolution which the Congress intended to create when the Convention was implemented. He asks this Court to return to costly, virtually unworkable, and oft-criticized litigation as the only means of vindicating rights in international trade.

CONCLUSION

The petition for *certiorari* should be denied.

Respectfully submitted,

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SHEILA H. MARSHALL
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APPENDIX A

[Seal] UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF THE
EXECUTIVE DIRECTOR

Stop 2-6

October 11, 1991

Taylor R. Briggs, Esq.
LeBoeuf, Lamb, Leiby & MacRae
520 Madison Avenue
New York, New York 10022

Re: FOIA #91-1351

Dear Mr. Briggs:

This is in response to your letter dated October 3, 1991, and received in this Office on October 4, 1991, in which you request access to a letter from Ms. Mary E.T. Beach to Don J. Pease concerning Lloyd's of London's solicitation of American citizens to become participants in Lloyds, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. 552

We have identified the responsive letter and made a determination to grant access. A copy of the letter is enclosed

If you have any questions, please contact Arleta D. Cunningham of my staff at (202) 272-3651

Sincerely,

[Hannah R. Hall]

Hannah R. Hall
FOIA/Privacy Act Branch Chief

Enclosure

[Seal]

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

August 5, 1991

CHAIRMAN'S OFFICE
MAILED
AUG 5 1991

The Honorable Don J. Pease
United States House of
Representatives
2410 Rayburn Building
Washington, D.C. 20515

Signed by: _____

Re: Lloyd's of London

Dear Congressman Pease:

I have been asked to respond to your letter of June 20, 1991 in which you ask certain questions pertaining to a letter you received from one of your constituents, Mr. John Steiner Roby. Mr. Roby's letter concerns the solicitation of American citizens to become participants in Lloyd's of London ("Lloyd's") by becoming Names, and the subsequent losses of those who become Names.

Before we address your specific questions perhaps it would be helpful if we briefly described the unique structure of Lloyd's, as it is not an insurance company in the manner of a typical U.S. insurance company. There are three basic components of Lloyd's. First is Lloyd's itself ("Lloyd's") which is not a company but rather an insurance marketplace at which individuals conduct separate insurance underwriting businesses. The second component is the Corporation of Lloyd's, whose sole function is to provide the premises, administrative staff and support services. The third component is the Council of Lloyd's (the "Council") which is the body charged with regulating the entire Lloyd's structure. The individuals who comprise Lloyd's, called "Members" or "Names", conduct their

underwriting business exclusively through "Members' Agents". All Members must be elected to their memberships by the Council and must be sponsored by two other members. All of a Member's underwriting business at Lloyd's is conducted pursuant to a standard Agency Agreement with the Members' Agent. The Agency Agreement grants the Members' Agent continuing authority to conduct the Members' underwriting business, including accepting risks and effecting reinsurance, collecting all premiums due the Member, and paying all liabilities and other obligations of a Member. In essence, a Member delegates complete control of his affairs to the Members' Agent and the Member may take no part in the day-to-day business. The Members' Agent exercises virtually complete control over a Members' syndicate participation. Finally, the active insurance underwriters at the end of the chain are principals or employees of "Managing Agents", which are U.K. Corporations or partnerships approved by the Council to accept insurance risks at Lloyd's. Managing Agents are either also Members' Agents or are the agents of such Members' Agents.

Your first question is whether there is any regulation of Lloyd's solicitation of participations in the United States. The staff of the Commission's Division of Corporation Finance has had discussions on two occasions with Lloyd's concerning the applicability of the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act") to the solicitation of U.S. Citizens to participate in Lloyd's. It is the Division's position that the solicitation of participations involves the sale of a security, with the issuer of that security being the particular Members' Agent involved. Accordingly, such U.S. sales would be subject to all of the provisions of the Securities Act and the Exchange Act, including the anti-fraud provisions. At the time of those prior discussions, it was determined that if the Members' Agents solicited participations in accordance with the procedures proposed by Lloyd's counsel (an offering structure intended to comply with the Commission's Regulation D), registration under the Securities Act would not be required. However, in light of the issues raised by Mr. Roby and others, the staff may consider

whether the actions of Members' Agents were consistent with the earlier representations of counsel and whether further action is appropriate.

Your second question is whether the participations in Lloyd's are analogous to partnerships and what regulations apply to those types of investments. While Lloyd's participations do more closely resemble general partnership interests than they do other securities, such as shares of common stock, they are quite unique investments. For example, they may only be held by individuals, they are not transferable, even under the laws of descent and distribution, and the liability thereunder is unlimited although no Name is liable for the "share" of other Names. There is no existing precedent as to whether Lloyd's participations are securities but, as was pointed out above, the Division of Corporation Finance believes they are securities and as such are subject to the provisions of the Federal securities laws in the same manner and to the same extent as more conventional securities.

Finally, you ask whether U.S. participants in Lloyd's properly can obtain venue in litigation against Lloyd's in the United States. Your constituent asserted that litigation against Lloyd's in the United States has been terminated as not being properly venued. We are not aware of the litigation to which your constituent refers, although it may involve a cause of action outside the Federal securities laws. However, subject to certain limitations and conditions, the provisions of the Federal securities laws generally are as applicable to the sales of foreign securities (including participations in Lloyd's) in the United States as they are to the sales of domestic securities.

I hope that the above material will be helpful in responding to your constituent's concerns. If you have any further questions, please do not hesitate to contact me.

Sincerely,

Mary E. T. Beach
Senior Associate Director

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 91 C 5525

KENNETH F. BONNY, FRANCESCA B. BONNY and ROBERT D. FLESVIG,

Plaintiffs,

—v.—

THE SOCIETY OF LLOYD'S, HARRIS BANK GLENCOE-NORTHBROOK, N.A., HARRIS TRUST AND SAVINGS BANK, BANK OF MONTREAL, NORTHFIELD VENTURE, INC., ROBERT B. KING, ALAN J. HUNKEN, LIME STREET UNDERWRITING AGENCIES LTD., ROBIN C. KINGSLEY, ROBERT C. HALLAM, PATRICK M. CORBETT, and BANKSIDE UNDERWRITING AGENCIES LTD.,

Defendants.

HONORABLE CHARLES R. NORGLE

ORDER

Before the court are the objections of plaintiffs Kenneth F. Bonny, Francesca B. Bonny and Robert D. Flesvig to Magistrate Judge Gottschall's April 20, 1992 report and recommendation that plaintiffs' amended complaint be dismissed. For reasons that follow, the report and recommendation (attached as Appendix A) is adopted and the plaintiffs' amended complaint is dismissed.

The defendants' motion to dismiss the amended complaint was referred to Magistrate Judge Gottschall pursuant to 28 U.S.C. § 636(b)(1)(B). The plaintiffs filed objections on May 4, 1992 to the Magistrate Judge's report and recommendation. Defendants Lime Street Underwriting Agencies, Ltd., Robin C. Kingsley, Robert C. Hallam, Patrick Corbett, and Bankside Underwriting Agencies, Ltd. filed a response on May 15, 1992 to the plaintiffs' objections.

Upon a magistrate judge's submission of a report and recommendation on a motion to dismiss, and the timely filing of objections by a party to the proceeding, the district court must make a *de novo* determination based upon the record and may accept, reject or modify the recommended disposition. Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1)(C). The court has reviewed the report and recommendation, and finds that it accurately interpreted this court's prior opinion denying the plaintiff's request for a preliminary injunction. *Bonny v. Society of Lloyd's*, 784 F. Supp. 1350 (N.D. Ill. 1992). The report and recommendation is also well-supported by the record and the applicable law. Accordingly, the report and recommendation is adopted and the defendants' motion to dismiss the amended complaint is granted.

IT IS SO ORDERED.

ENTER:

[Charles R. Norgle]
CHARLES RONALD NORGLE, SR., Judge
United States District Court

DATED: [5/29/92]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 91 C 5525

KENNETH F. BONNY, FRANCESCA B. BONNY and ROBERT D. FLESVIG,

Plaintiffs,

—v.—

THE SOCIETY OF LLOYD'S, HARRIS BANK GLENCOE-NORTHBROOK, N.A., HARRIS TRUST AND SAVINGS BANK, BANK OF MONTREAL, NORTHFIELD VENTURE, INC., ROBERT B. KING, ALAN J. HUNKEN, LIME STREET UNDERWRITING AGENCIES LTD., ROBIN C. KINGSLEY, ROBERT C. HALLAM, PATRICK M. CORBETT, and BANKSIDE UNDERWRITING AGENCIES LTD.,

Defendants.

REPORT AND RECOMMENDATION ON DEFENDANTS' MOTIONS TO DISMISS

TO THE HONORABLE CHARLES R. NORGLE, SR., one of the Judges of the United States District Court for the Northern District of Illinois.

In its Report and Recommendation issued on September 26, 1991, this court concluded that plaintiffs had shown a likelihood of success on the merits of their claim that the forum

selection and choice of law clauses in their contractual undertakings with defendants should not be enforced. This court read the relevant decisions of the Supreme Court and the anti-waiver provision of the 1933 Securities Act to mean that if the combined effect of the parties' forum selection and choice of law clauses was to make it likely that plaintiffs would lose not only a judicial forum but their securities law cause of action, the clauses should not be enforced.

In rejecting this court's recommendation in his February 24, 1992 Order ("the Order"), Judge Norgle clearly rejected this court's interpretation of the governing law. Judge Norgle ruled that once it is determined that an agreement is "international," the anti-waiver provision of the 1933 Securities Act will not overcome the parties' freely-negotiated forum selection and choice of law clauses.

While Judge Norgle's decision establishes only that plaintiffs have not shown a *likelihood* of success on the merits and does not *necessarily* mean that their claims must be dismissed, this court views Judge Norgle's decision as dispositive for all practical purposes. The contracts at issue are clearly "international" in the sense described by Judge Norgle. This court believes that based upon that finding, Judge Norgle would uphold the forum selection clauses on this record.

This court might well reach this same conclusion applying its own interpretation of the relevant Supreme Court precedents. On a fuller examination of English law, it might conclude that an English forum would adequately allow plaintiffs the opportunity to vindicate their rights. It might conclude that plaintiffs' securities claims are barred by limitations, that the claims must be arbitrated or that the allegations of fraud are insufficient to disturb the integrity of plaintiffs' letters of credit. But pursuing any of these issues would be expensive and time-consuming for the parties. Since this court views Judge Norgle's analysis of the issues as dispositive of a controlling question of law raised by the motions to dismiss, it sees no good reason to delay the proceedings further. Based on Judge Norgle's order of February 24, 1992, therefore, it is recommended that the forum selection clauses of the parties' agreements be upheld,

and that accordingly, the Motions to Dismiss the Amended Complaint of Defendant The Society of Lloyd's and Defendants Lime Street Underwriting Agencies Ltd., Robin C. Kingsley, Robert C. Hallam, Patrick M. Corbett and Bankside Underwriting Agencies Ltd., be granted.

Counsel are given ten days from the date hereof to file objections to this Report and Recommendation with the Honorable Charles R. Norgle, Sr. Failure to object constitutes waiver of the right to appeal.

Respectfully submitted,

[Joan B. Gottschall]
JOAN B. GOTTSCHALL
United States Magistrate Judge

DATED: April [20], 1992

Supreme Court, U.S.
FILED
NOV 19 1992
OFFICE OF THE CLERK

No. 92-664

In The

Supreme Court of the United States

October Term, 1992

RONALD H. RILEY,

Petitioner,

v.

KINGSLEY UNDERWRITING AGENCIES, LTD., a British corporation, LIME STREET UNDERWRITING AGENCIES, LTD., a British corporation, BANKSIDE SYNDICATE LIMITED, a British corporation, FIRSTBANK OF VAIL, N.A., ROBIN C. KINGSLEY, ROBERT HALLAM, SOCIETY AND COUNCIL OF LLOYD'S, and JOHN DOES I through X,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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REPLY TO COUNTERSTATEMENT OF THE FACTS

Respondents' Counterstatement of the Facts frames the issue before this court. While the Securities and Exchange Commission (the "SEC") has concluded that Respondents' sale of investments in Lloyd's of London ("Lloyd's") is subject to the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act"), the effect of the Tenth Circuit's decision is that it is not, thus operating to waive Mr. Riley's statutory protections under the U.S. Securities laws. This decision is contrary to well established holdings of this Court and the Congress.[1]

As Respondents point out, in 1987 and 1988 the SEC reviewed the issue of whether the sale of interests in Lloyd's falls within the scope of the Securities Act and the Exchange Act. The SEC determined that the sale of interests in Lloyd's "would be subject to all of the provisions of the Securities Act and the Exchange Act, *including the anti-fraud provisions.*" Respondents' Brief in Opposition, at RA-3 ("Respondents' Brief") (emphasis added).

---

[1] Congress has mandated that substantive protections of the U.S. Securities laws cannot be waived by including anti-waiver provisions in both Acts. *See* Section 14 of the Securities Act (15 U.S.C. Section 77n) and Section 29(a) of the Securities Exchange Act (15 U.S.C. Section 78cc (a)) (collectively the "anti-waiver provisions"). Additionally, this Court has indicated that where, as here, choice of law and choice of forum clauses ("Choice Clauses") operate in tandem as a prospective waiver of a parties' right to pursue statutory remedies, this Court would have "little hesitation in condemning the agreement as against public policy." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 637, n. 19 (1985).

Respondents characterize their mass distribution of securities to U.S. citizens as having an "international character."[2] Respondents' Brief, at 1. However, each of Petitioner's claims arise from his purchase of securities from Respondents during the time period 1988 through 1990, and not before. All solicitations from Respondents during this time period were received by Petitioner in Colorado, by mail or by telephone, from England. The international character of the transaction arises only because Respondents are foreign issuers of securities operating in the U.S. The SEC opined that the "provisions of the Federal securities laws generally are applicable to the sales of foreign securities (*including participations in Lloyd's*) . . . . " *See* Respondents' Brief, at RA-4. (emphasis added). Contrary to the SEC's opinion, the impact of the Tenth Circuit's decision is that the Federal securities laws are *not* applicable to Respondents' sale of securities in the U.S.

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[2] Assuming each of the 2,900 U.S. Names who participated in Lloyd's invested the relatively low amount of £250,000 (Petitioner invested over £1,000,000 his last four years), Lloyd's raised in excess of One Billion U.S. Dollars in capital from U.S. investors. Respondents place great weight on the fact that "*if* the Members Agents solicited participation in Lloyd's in compliance with the procedures of the Commission's Regulation D," registration was not required. Respondents' Brief, at 1 (emphasis added). First, it is inconceivable that Respondents could raise $1 billion from U.S. investors and meet the requirements of Regulation D which relates to raising capital through other than a public offering of securities. Second, regardless of whether registration would be required, the anti-fraud provisions of the U.S. Securities laws would continue to apply.

REPLY TO RESPONDENTS' OPPOSITION TO CERTIORARI

I.

Denial of the Petition for Writ of Certiorari Sets a Dangerous Precedent, in effect, Nullifying this Court's Holdings in *Mitsubishi, McMahon,* and *Rodriguez*.

Respondents argue in their Brief that Mr. Riley's Petition should be denied because the decision of the Tenth Circuit to enforce the Choice Clauses, which waives substantive protections of the U.S. Securities laws, is consistent with this Court's holdings that Choice Clauses in international agreements must be upheld. To the contrary, the decision of the Tenth Circuit directly conflicts with the holding of this Court in *Mitsubishi,* wherein Justice Blackmun, writing for the Court, concluded that the Court would not hesitate to strike down Choice Clauses in international agreements, and condemn them as against public policy, if they operate in tandem as a prospective waiver of a party's right to pursue U.S. statutory remedies.[3]

Moreover, the Tenth Circuit's decision is directly contrary to the Congressional mandate in the anti-waiver

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[3] 473 U.S. 605, 637, n. 19. Respondents ignore this plain holding of *Mitsubishi,* instead arguing that *Mitsubishi* stands for the principle that public policy issues are ripe for application, if ever, only at the enforcement stage of arbitral or litigation proceedings. Such argument clearly misconstrues the holding of *Mitsubishi* in footnote 19. The Court in *Mitsubishi* clearly stated it would condemn the *agreement itself,* not the award, if there was a *prospective waiver* of the right to pursue statutory remedies. Since counsel for Mitsubishi had conceded that American law applied, and the antitrust claims had been submitted to the Japanese panel on that basis, the Court then did not need to speculate whether U.S. law would be displaced.

provisions of the U.S. Securities laws that any agreements "to waive compliance with any provision of [either Act] are void," and this Court's holdings in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), and *Gilmer v. Interstate/Johnson Lane Corp.*, ___ U.S. ___, 111 S. Ct. 1647 (1991), interpreting the same, that the substantive provisions of the U.S. Securities laws cannot be waived.

The Choice Clauses in the case at hand seek to apply English law. These Clauses clearly operate as a waiver of the substantive protections of the U.S. Securities laws, since Respondents would be exempt from claims for violations of the registration, disclosure, and anti-fraud provisions under English law by virtue of the Lloyd's Act and the Financial Services Act.[4] Respondents have completely exempted themselves through use of such clauses even though the SEC has flatly concluded that investment and participation in Lloyd's by a U.S. Name constitute a security. Respondents' Brief, at RA-3, 4.

The other cases relied upon by Respondents also do not support their argument. Respondents' Brief, at 4-10. The Choice Clauses at issue in *M/S The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) and *Carnival Cruise Lines,*

---

[4] *See* Petition for Certiorari, at 13-15 ("Petition"). Respondents' argument that it is impossible to determine whether arbitration in England under English laws would ultimately infringe to an unacceptable degree upon Petitioner's rights is thus without merit. Moreover, Respondents' reliance on *Roby v. Corporation of Lloyd's*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,971 (S.D.N.Y. Aug. 18, 1992) is misplaced, as that decision, along with the Tenth Circuit decision, was decided directly contrary to the authority of this Court and Congress that substantive protections of the U.S. Securities laws cannot be waived.

Inc. v. Shute, ___ U.S. ___, 111 S. Ct. 1522 (1991) did not operate to deprive the respective parties of statutory rights, since no statutory rights were at issue. Moreover, *The Bremen* specifically recognized that Choice Clauses should not be enforced where to do so would contravene a strong public policy. 407 U.S. at 15; *see also* Petition, at 16-17.

Similarly, the clauses at issue in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) provided that Illinois law would apply; thus, potential waivers of statutory protections were not at issue. *See* Petition, at 17. The Court in *Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944 (1st Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1172 (1992), determined that, since only procedural and small differences in standards existed between Canadian law and American law, trial in Canada would not deprive the plaintiff of relevant substantive legal advantages. Finally, *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985) simply involved the possible collateral estoppel effect of an arbitration clause to another proceeding which is not at issue here.

Denial of Mr. Riley's Petition will, in effect, nullify the holdings of this Court in *Mitsubishi*, *McMahon*, and *Rodriguez*, as well as nullify the effectiveness of the anti-waiver provisions of the U.S. Securities laws, by allowing a decision of a Circuit Court to stand that is directly contrary to their explicit instructions without so much as a review by this Court. Further, denial would set a dangerous precedent by sending a clear message to foreign entities doing business with American citizens that they may avoid compliance with the U.S. Securities laws by the simple expedient of using Choice Clauses which provide for a less restrictive foreign law to apply. This Court

should thus grant *certiorari* to settle this important and far reaching question of federal law.

II.

The Arbitration Clause Cannot be Enforced Since it Operates to Contravene Fundamental United States' Public Policies.

A. The General Policies Supporting Enforcement of Arbitration Clauses do not Compel Arbitration in this Case.

Respondents have utterly failed to address this Court's directive as expressed in *McMahon*, *Rodriguez*, and *Gilmer*, that enforcement of an arbitration agreement cannot undermine the substantive protections afforded U.S. investors by the U.S. Securities laws.[5] *McMahon*, 482 U.S. at 230; *Rodriguez*, 490 U.S. at 481-82; *Gilmer*, 111 S.Ct. at 1653.

Where the arbitral proceedings will deprive plaintiffs of their substantive *statutory* rights, this court has flatly

---

[5] None of the other cases cited by Respondents deal with arbitration of securities claims. *See* Respondents' Brief in Opposition, at 12-13. In fact, several of the cases cited do not even deal with the issue of enforcement of arbitration agreements, in general. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992) (dealing with Foreign Sovereign Immunities Act); *Ministry of Defense of the Islamic Republic v. Gould, Inc.*, 969 F.2d 764 (9th Cir. 1992) (dealing with the enforcement of an award from the U.S.-Iran Claims Tribunal); *McDermott Int'l, Inc. v. Underwriters at Lloyd's*, 944 F.2d 1199 (5th Cir. 1991) (dealing with removal rights); *Interamerican Trade Corp. v. Companhia Fabricadora de Pecas*, 973 F.2d 487 (6th Cir. 1992) (dealing with forum selection clause); *Paper Express, Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753 (7th Cir. 1992) (dealing with forum selection clause).

stated that such agreements would be void as against public policy. *Mitsubishi*, 473 U.S. at 637, n. 19; *see also McMahon*, 482 U.S. at 230. In the case at issue, this Court is faced with just that situation.

Mr. Riley signed, in Colorado, several pre-printed, form agreements with Respondents. One of those agreements, the agreement with his Member's Agents, contained a clause requiring arbitration of disputes in England, under English law.[6] As stated in the Petition, an English arbitrator faced with such an agreement would apply English law. Petition, at 13-15. Even assuming Mr. Riley could maintain a right to pursue Respondents on a theory of common law fraud, he is flatly precluded from bringing a claim for failure to register the securities under the Securities Act, and from bringing a claim pursuant to the anti-fraud provisions of the Securities Act and the Exchange Act. Mr. Riley benefits from strict liability for Lloyd's violations of the registration provisions and anti-fraud provisions of the U.S. Securities laws. Under English law, Mr. Riley must prove bad faith. Thus, Mr. Riley would be deprived of his statutory rights under the U.S. Securities laws if the Arbitration Agreement is enforced. Such a deprivation fits squarely within this Court's decision in *Mitsubishi*.

---

[6] The only parties subject to the Arbitration Agreement are the Member's Agents. Lloyd's and the other Respondents are not parties to an arbitration agreement with Mr. Riley. Therefore, even if this Court decides that the Convention must prevail with regard to the Arbitration Agreement, such a decision would have no effect on the enforceability of the Choice Clauses present in the other agreements.

B. The Convention does not Require Enforcement of Arbitration Agreements when Enforcement Would Contravene Fundamental Public Policies of the Forum State.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards requires the enforcement of arbitration clauses unless such clauses are "null and void, inoperative or incapable of being performed." 9 U.S.C. § 201, et seq. (the "Convention"). According to this Court, an agreement to arbitrate is "null and void" when it "contravenes fundamental policies of the forum state." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 530, n. 10 (1974); *see also Rhone Mediterranee Compagnia v. Lauro*, 712 F.2d 50, 53 (3rd Cir. 1983); *Meadows Indemnity Co. v. Baccala & Shoop Insurance Services, Inc.*, 760 F.Supp. 1036, 1043 (E.D.N.Y. 1991) (emphasis added). Respondents fail to even address this distinction in their Opposition.

Here, a fundamental public policy of the United States is contravened. This Court has flatly stated that the fundamental policy behind the Securities laws is the protection of the investor. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). For that reason, the Securities laws provide for strict liability for failure to register and for misrepresentations and omissions in the offering documents as well as a broad anti-fraud provision to prevent misrepresentations in the purchase and sale of securities.

Respondents have raised over one billion dollars selling securities in the United States to U.S. citizens. By virtue of a form arbitration agreement in their offering documents, Respondents now claim to be exempt from enforcement of the registration and anti-fraud provisions of the U.S. Securities laws. To allow foreign issuers, such as Lloyd's and its agents, to evade the protections of the

U.S. Securities laws by invoking the Convention would clearly circumvent the cornerstone of our Securities laws and constitute a judicially created exemption to an investor's strong remedies against the sellers of securities. This is clearly not the purpose nor the intent of the Convention and this Court should not allow it to be interpreted in such a way.

III.

The Decisions of the District Courts Conflict with each other and Conflict with the Holdings of this Court and the Mandate of Congress in the U.S. Securities laws.

Petitioner does not contend, and has never contended, that *certiorari* should be granted because decisions of the Courts of Appeals are in conflict. Instead, Petitioner informed this Court in its Petition that decisions of the federal district courts are in conflict on this issue. Two of these decisions, *Bonny v. Society of Lloyd's*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,811 (N.D.Ill. Feb. 24, 1992) and *Roby, supra* were decided in accordance with the Tenth Circuit decision at issue herein that conflicts with *Mitsubishi, McMahon, Rodriguez,* and the anti-waiver provisions of the U.S. Securities laws, as discussed above. *See* § I, *supra*.[7] Since the district courts and the Tenth Circuit have decided an issue of far reaching consequence, and set important and dangerous precedents that are contrary to the holdings of this Court and

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[7] *Hirsch v. Oakeley Vaughan Underwriting, Ltd. et al.*, No. 89-2563, unpublished slip opinion (5th Cir. 1989) and *Howe v. Goldcorp, supra,* are not relevant to the case at hand, as they involved the issue of *forum non conveniens* which is not at issue in this Petition.

the mandate of Congress, Petitioner requests that this Court grant *certiorari* to settle the issue.

CONCLUSION

For the reasons set forth herein, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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